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Cover Page Footnote

Assistant Professor of Law, University of Illinois College of Law. I wish to thank Professor Kit Kinports for her tireless support; Brian Crowley, my research assistant, for many hours of work; and the College of Law, for financing this research.

MANEUVERING THROUGH THE LABYRINTH: THE EMPLOYERS' PARADOX IN RESPONDING TO HOSTILE ENVIRONMENT SEXUAL HARASSMENT—A PROPOSED WAY OUT

*Estelle D. Franklin**

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I. DESCENT INTO THE LABYRINTH OF LIABILITY

> A male employee sends a female employee signed, unwanted "love" letters, some of which have obsessive, possibly threatening overtones. The employer transfers the harassing employee to another facility, but the transferred employee grieves the action. Rather than fight the grievance, the employer agrees to allow the transferred employee to return to the original facility, without discipline, after a six-month cooling-off period. Upon learning of the impending return of the harasser, the victim quits and sues the employer.[1]

BY now it is well established that something called "sexual harassment"[2] in the workplace is prohibited by Title VII of the Civil

1. This scenario is derived from *Ellison v. Brady*, 924 F.2d 872, 873-75 (9th Cir. 1991), a case best known for holding that the existence of harassment should be determined from the vantage of a "reasonable woman." *Id.* at 884; *see infra* Part II. The notes and letters did not directly threaten the victim, rather, they contained frightening, obsessive language, such as "I cried over you last night and I'm totally drained," and "I have enjoyed you so much over these past few months. Watching you. Experiencing you from O [sic] so far away." *Ellison*, 924 F.2d at 874.

2. There is really no set definition of sexual harassment. The concept of sexual harassment has been evolving since the mid-1970s. Catharine A. MacKinnon, in her seminal work, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979), defined sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power." *Id.* at 1. It has also been described as "unsolicited, nonreciprocal male behavior that asserts a woman's sex role over her function as a worker." Lin Farley, Sexual Shakedown: The Sexual Harassment of Women on the Job 14-15 (1978). More recently, it was broadly defined as "abusive treatment of an employee, by the employer or by a person or persons under the employer's control, which would not occur but for the victim's sex." 3 Employment Discrimination § 46.01.[1], at 44-46 (Lex K. Larson ed., 1998). The quest for a clear legal definition is also ongoing. While courts almost all uniformly cite the same elements, there is very little agreement on the meaning behind those elements. Indeed, the numerous splits in the circuit courts, and the need for more clarity may well be the driving force behind the Supreme Court's decision to have granted certiorari in

Rights Act of 1964 (Title VII).[3] When employers recognize that it is occurring at their workplace,[4] or when they substantiate a complaint of sexual harassment, they must take some action against the harasser or face almost certain liability for the harassment.[5] When employers take action, however, they run the risk of encountering the wrath of the "angry man"[6] who has been accused of sexual harassment, and who seeks to turn the tables and characterize himself as the victim.[7]

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a record four sexual harassment cases in the 1997-1998 term. For a detailed discussion of the legal requirements for a sexual harassment cause of action, see *infra* Part II.

3. Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (1964) (codified as amended principally at 42 U.S.C. §§ 2000e-1–2000e-17 (1994)). Title VII, which prohibits, among other things, sex discrimination in employment, does not specifically mention sexual harassment. The Supreme Court, however, recognized sexual harassment as a cause of action under Title VII in the seminal case of *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

4. Recognition of sexual harassment can be a formidable task because of the ambiguous nature of the term and a legal standard that relies on a case-by-case analysis to determine its existence. *See infra* Part II.

5. The 1998 Supreme Court cases of *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2293 (1998), both make clear that corrective action on the part of an employer is implicated when the harasser is a supervisory employee (where the absence of corrective activity will render the employer liable under a theory of vicarious liability), or when the harasser is a co-worker of the victim (which will render the employer liable under a negligence theory). *See infra* Part III.A. (discussing employer liability).

6. As used in this Article, the phrase "angry man" is a variation of the phrase "angry white man," which has been used to describe a conservative backlash movement against certain aspects of anti-discrimination laws, particularly affirmative action. *See* David Gates, *White Male Paranoia*, Newsweek, Mar. 29, 1993, at 48. I use the term "angry male" to describe a similar backlash movement by males accused of sexual harassment.

7. Title VII, of course, protects men from unwanted sexual harassment as well as women. Harassment cases brought by men have been successfully prosecuted in the courts and have led to substantial verdicts. *See, e.g.*, John L. Mitchell, *Man Gets $1-Million Award in Sexual Harassment Case*, L.A. Times, May 20, 1993, at A1 (describing case in which a male plaintiff alleging sexual harassment by his female supervisor obtained a $1 million verdict). The frequency of such harassment, however, is significantly lower in comparison to harassment of women by men. The Equal Employment Opportunity Commission (EEOC) reports that about 10% of sexual harassment complaints are claims by men. *See* U.S. Equal Employment Opportunity Commission, Sexual Harassment Charges EEOC & FEPAs Combined: FY 1992-FY 1998 (last modified Jan. 14, 1999) <http://www.eeoc.gov/stats/harass.html>. In addition, the Merit Systems Protection Board ("MSPB") found that harassment of women occurred more than twice as frequently as harassment of men. *See* Merit Systems Protection Board, Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges 13 (1994) (noting that 44% of women reported being harassed within the two-year period preceding the report, while only 19% of men reported such harassment). This finding is consistent with an earlier MSPB survey concerning sexual harassment: 42% of women reported harassment in 1980, compared to only 15% of men for the same time period. *See* Merit Systems Protection Board, Sexual Harassment in the Federal Workplace: Is It a Problem? 36 (1981). Indeed, one need only peruse the captions of sexual harassment cases to confirm that the vast majority of such actions are brought by women. Thus, I have chosen to follow the common path and speak of the alleged harasser as a male and the putative victim as a female.

"Angry men" who have been dismissed, demoted, or otherwise disciplined for their harassing conduct are striking back and suing their employers and former employers under a variety of theories,[8] or they are negotiating "diamond" parachutes to soften their landing.[9] These angry men suits have not been limited to instances where, given the uncertain state of sexual harassment law, it is disputable that the conduct in question constituted harassment.[10] To the contrary, accused harassers have sued and, in some instances, won, even where there is no question that egregious sexual harassment took place. Consider the following scenario:

> A male employee reaches around from behind a female co-worker, grabs her breasts and comments to another male co-worker that the breasts are real. The employer discharges the male employee shortly thereafter. The fired employee files a grievance and, after pursuing the grievance to arbitration, is ordered reinstated. The employer resists reinstatement, but loses its fight to overturn the arbitrator's decision in both the district and circuit court. The employer is ultimately successful in discharging the harassing employee when additional instances of harassment are uncovered during the investigation.[11]

Notwithstanding this usage, the principles are equally applicable when a man is harassed by a woman.

8. *See infra* notes 18-22 and accompanying text (discussing the various theories under which accused harassers have sued their employers or former employers).

9. J.P. Bolduc, former CEO of W.R. Grace, left his position amid allegations of sexual harassment. Regardless of whether the harassment allegations were a ruse or the primary reason for his departure, Bolduc left with a $42 million severance package. *See* Elizabeth Lesly, *Fall from Grace*, Bus. Wk., May 29, 1995, at 60, 60.

10. Determining exactly what conduct constitutes actionable sexual harassment is a difficult task which relies on a case-by-case analysis of the totality of the circumstances. A hostile environment exists when an employee is subjected to unwelcome and sufficiently severe or pervasive sexual conduct at the workplace, but suffers no tangible loss. In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the Supreme Court addressed the effect the conduct must have on the plaintiff to be considered actionable hostile environment harassment (as opposed to an unactionable annoyance). The Court rejected the severe psychological harm standard that had been adopted by some lower courts at one extreme and noted that Title VII was not a general civility code at the other extreme. *See id.* at 21-22. The middle area, however, must be determined on a case-by-case basis, relying on factors such as the nature and duration of the conduct, whether it was threatening or humiliating, and whether it interfered with the victim's ability to work. *See id.* at 23. The Court reiterated this approach in *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998). There, the Court found that same-sex harassment was actionable, but it emphasized that the context of the purporting harassing actions, including differences between the way males and females relate to each other, would be critical in determining whether the particular charged conduct would be sufficiently severe or pervasive to sustain the cause. *Id.* at 1002-03; *see infra* notes 47-52 and accompanying text (providing a more detailed discussion of the *Oncale* decision).

11. This scenario is derived from *Chrysler Motors Corp. v. International Union, Allied Industrial Workers*, 959 F.2d 685, 686 & n.1 (7th Cir. 1992) (upholding the district court's refusal to overturn the arbitrator's decision to reinstate the harasser), and *Chrysler Motors Corp. v. International Union, Allied Industrial Workers*, 2 F.3d 760

In this instance, as well as the opening scenario, the employer sought to act promptly, as it should, to eliminate a sexually hostile environment. Nonetheless, each employer was subjected to extensive legal maneuvering and expense, not because of the victim but because the harasser filed a grievance. Herein lies the paradox that employers face: they must act promptly and effectively to eliminate a sexually hostile environment created by their employees, for failure to do so will subject them to liability under Title VII.[12] The consequence of acting too promptly or too firmly, however, very well may be a grievance or a lawsuit by an angry man. Further, employers seeking to find the middle ground by imposing less severe discipline may be subjected to suits by both the alleged harasser, who grieves even the lesser penalty,[13] *and* the victim of the harassment, who feels that the hostile environment has not been eliminated. Employers are thus subjected to a double-edged sword: potential liability to the victim of the harassment if they fail to take prompt and appropriate corrective action, and the potential liability to the "angry man victim" if they take such action.

This labyrinth of activity surrounding sexual harassment charges has left employers in a quandary: no matter which route they choose, they subject themselves to potential liability, or, at the very least, to a costly and protracted legal battle to avoid liability.[14] Further, because

(7th Cir. 1993) (affirming the district court's denial of a contempt motion brought for failure to reinstate alleged harasser).

12. For a full discussion of the law governing employers' liability for harassment, see *infra* Part III. While this Article is couched in terms of the paradox created when Title VII pressures an employer to take corrective action, that pressure may come from other statutes as well, including Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1994), and sections 804 and 818(b)(1) of the Federal Housing Act, 42 U.S.C. § 3604(b) (1994), or even when common law tort actions are filed by members of the public. Notably, students may bring actions for damages under Title IX if they are harassed by teachers or other school employees. *See* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 76 (1992). Additionally, the lack of corrective action may result in employer liability. *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1999 (1998). For this reason, arbitrations and cases involving school employees disciplined for harassing students are included in this Article. Further, in instances where a member of the public has complained to the employer that she was sexually harassed by an employee, the employer may act so as to avoid future liability to the public at large.

13. *See infra* notes 182-93, 213-14, 235 and accompanying text; *infra* Table 2.

14. A study in the early 1990s estimated the cost to defend a single discrimination claim at $80,000, and put the cost of sexual harassment complaints to a typical Fortune 500 company at approximately $6.7 million annually. Linda Stamato, *Sexual Harassment in the Workplace: Is Mediation an Appropriate Forum?*, 10 Mediation Q. 167, 167 (1992). The average cost of defending a sexual harassment lawsuit ranges from $20,000 to $200,000. Jay Finegan, *Law and Disorder*, Inc., April, 1994, at 64, 67. The cost of employer attorney fees and costs are also sometimes reflected by indemnification awards. For example, in *Bradley Corp. v. Zurich Insurance Co.*, 984 F. Supp. 1193 (E.D. Wis. 1997), the insurer was ordered to pay the employer the $232,498.55 plus interest for attorney's fees and costs incurred by the employer in defending a sexual harassment case. *See id.* at 1205-06.

employers *must* respond in some fashion to every complaint of sexual harassment received,[15] and even to instances where no complaint has been filed but the existence of a sexually hostile environment is apparent,[16] there is a compelling need for a system under which the employer can act quickly and without fear of descending into the labyrinth of liability.

Alleged harassers have argued a wide variety of theories to challenge disciplinary action taken against them. Even those without explicit appeal rights[17] are suing their employers on a variety of theories, alleging, for example, lack of good faith and fair dealing,[18] negligent investigation,[19] defamation,[20] and discrimination.[21] Additionally, some alleged harassers even seek indemnification for attorneys' fees.[22]

15. *See infra* notes 146-50 for a discussion of two recent Supreme Court decisions which created an affirmative defense for employers in sexual harassment suits if they can show that they had an appropriate policy and procedure in place and either that it acted reasonably once it knew of the harassment or that the victim of the harassment, knowing of the procedure, did not attempt to use it.

16. *See infra* notes 112-15 and accompanying text.

17. Generally, private employers may contractually agree to discipline or discharge employees only for just cause or some other articulated standard, and to provide a method for challenging disciplinary action. Public employers may or may not have undertaken contractual obligations, but they have additional constraints on employer actions and forums for resolving those differences. Unless such constraints exist, however, the employment relationship is said to be "at will," and the employer is generally free to act as it wishes without any particular justification so long as it does not violate any laws in the process. In these circumstances, the employee has no direct internal means to challenge the employer's actions; the employee must proceed to a judicial forum and rely on statutory or common law.

18. *See, e.g.*, Kestenbaum v. Pennzoil Co., 766 P.2d 280, 287 (N.M. 1988) (agreeing that the employer need only in good faith believe that the employee engaged in inappropriate conduct in the workplace); Corporon v. Safeway Stores, Inc., 708 P.2d 1385, 1390 (Colo. Ct. App. 1985) (stating that an allegation of unfair dealing in a termination of an at-will contract is not actionable under Colorado law).

19. *See, e.g.*, Lambert v. Morehouse, 843 P.2d 1116, 1119 (Wash. Ct. App. 1993) (declining to review the appellate court's holding that negligent investigation in the employment context is not actionable); Lawson v. Boeing Co., 792 P.2d 545, 548 (Wash. Ct. App. 1990) (finding insufficient evidence of negligence to create a material issue of fact as to negligent investigation).

20. *See, e.g.*, Duffy v. Leading Edge Prods., Inc., 44 F.3d 308, 310 (5th Cir. 1995) (alleging that the employer made false accusations of sexual harassment).

21. These cases come in several varieties: allegations that women who participate in creating hostile environments are treated more leniently than men who do so, *see* Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 800-01 (6th Cir. 1994); allegations that the alleged sexual harassment is a pretext for discrimination on some other protected basis, *see* Williams v. General Mills, Inc., 926 F. Supp. 1367, 1373 (N.D. Ill. 1996); and allegations that a college overreacted to charges of sexual harassment by female students to the detriment of male students, *see* Yusuf v. Vassar College, 35 F.3d 709, 715-16 (2d Cir. 1994).

22. *See, e.g.*, Farmers Ins. Group v. County of Santa Clara, 906 P.2d 440, 459 (Cal. 1995) (rejecting a claim for indemnification for violations of the Fair Employment and Housing Acts).

Alleged harassers are also suing putative victims and sometimes enjoying more success than when they sue employers.[23]

The most successful actions for an alleged harasser seem to occur when he pursues his complaint under a collective bargaining agreement with a just cause provision, or when the employer is otherwise required to establish just cause for its action before an arbitrator.[24] My research shows that arbitrators grant some form of relief to the accused harasser, usually by reducing the penalty imposed by the employer, in nearly half of the reported challenges.[25] To optimize the arbitration process for the benefit of employers, victims, and accused harassers, steps must be taken to modify the arbitration system so that employers will be encouraged to implement sexual harassment policies and employees will share responsibility for addressing the problem of workplace sexual harassment, and will be encouraged to promptly report all potentially harassing conduct.

In this Article, I explore the paradox facing employers attempting to eliminate sexually hostile environments while avoiding liability to "angry men" who use arbitration to appeal disciplinary action for sexual harassment. Part II of this Article provides a brief overview of hostile environment sexual harassment law, focusing on the confusion caused by the widely vacillating standards used in defining sexual harassment and the problems in determining employer liability. Part III reports trends in arbitrations derived from the database that I constructed of reported arbitrations challenging discipline for sexual harassment. In addition, part III contrasts the factors that arbitrators consider in determining just cause with the factors that courts consider when determining sexual harassment liability. Finally, part IV proposes a system to relieve, at least partially, the descent into the labyrinth of liability for employers whose employees have direct appeal rights.[26] Specifically, part IV proposes that employers develop sexual harassment policies that: (1) reject the totality of circumstances test used by courts to determine the existence of sexual harassment and instead adopt anti-harassment policies that utilize bright lines in the form of detailed work rules and a table of penalties, and (2) use a dual responsibility approach under which the employer and employee each assume responsibility for preventing and remedying harassment.

23. *See, e.g.*, Williams v. Garraghty, 455 S.E.2d 209 (Va. 1995) (awarding compensatory and punitive damages to a supervisor accused of sexual harassment). Although the propriety of such actions is beyond the scope of this Article, they are described peripherally to complete the picture of the labyrinth of actions surrounding sexual harassment.

24. Hundreds of claims in arbitration cases are based on the theory that the employer lacked just cause for the imposed discipline. *See infra* Table 1 and accompanying text.

25. To study this issue I compiled a database of some 316 arbitrations of challenges to discipline for sexual harassment. The arbitrations studied are listed in the Appendix.

26. *See infra* Part IV.

Under this approach, the employer will require that all supervisory personnel have the duty to report complaints and observations of potentially harassing conduct, and the employee victim will take responsibility by reporting all potentially harassing conduct or be foreclosed from later raising a complaint.

II. HOSTILE ENVIRONMENT SEXUAL HARASSMENT

A. *Background*

Because the guiding standards are replete with descriptive phrases capable of wide variation in their interpretation, recognizing sexual harassment and the circumstances under which employers are liable for such harassment is a formidable task for employers and employees.[27] Nonetheless, despite the definitional problems, sexual harassment in the workplace undoubtedly continues to be a severe problem. Early studies indicated that between 49% and 92% of women, depending on their occupation, believed that they had been sexually harassed on the job.[28] Further, there is no indication that sexual harassment is declining; indeed, charges filed with the United States Equal Employment Opportunity Commission (EEOC) alleging sexual harassment have sharply increased over the last decade, finally leveling off somewhat during the last few years.[29]

That an employer, under certain circumstances, can be held liable for sexual harassment under Title VII is by now beyond peradven-

27. For example: What is meant by "unwelcome"? Does "conduct of a sexual nature" impose a limit on the type of conduct considered, or is non-sexual gender-based conduct included? When is conduct "sufficiently" severe to constitute harassment? How does the employer evaluate whether it "should have known" about harassment?

28. *See* MacKinnon, *supra* note 2, at 25-28.

29. The number of sexual harassment charges filed with the EEOC climbed from 5623 in 1989 to 15,889 in 1997. *See* U.S. Equal Employment Opportunity Comm'n, Sexual Harassment Charges EEOC & FEPAs Combined: FY 1992-FY 1998 (last modified Jan. 14, 1999) <http://www.eeoc.gov/stats/harass.html>. In 1995, 1996, and 1997, the number of charges averaged around 15,500 per year. *See id.* The increase can be attributed to several factors, including the widespread publicity surrounding several allegations of harassment. Since 1991, there has been an almost non-stop barrage of media publicity and coverage of various instances of sexual harassment allegations. These instances include the confirmation hearings for Justice Clarence Thomas, who was accused by Professor Anita Hill of sexually harassing her while she worked for him at the EEOC and the Department of Education; the Tailhook incident, in which female naval officers were forced to run a gauntlet of sexual abuse by male naval officers while attending an annual retreat; the allegations of sexual harassment against Senator Robert Packwood; a sexual harassment lawsuit against President Bill Clinton; and the court martial of the Army's highest ranking enlisted officer. In addition to widespread publicity, and perhaps more importantly, the Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (1991) (codified at 42 U.S.C. § 1981a (1994)), provided, for the first time, monetary relief in the form of compensatory and punitive damages in federal sexual harassment cases. *See id.* Thus, increased awareness and increased monetary relief both have contributed to this dramatic increase in charges of sexual harassment.

ture.[30] The exact nature of both the circumstances constituting harassment and the basis for imposing liability on the employer, however, continues to be elusive. Specifically, there are two main areas of confusion: (1) what conduct is actionable, and (2) when employers will be held liable for the conduct of their employees.

To determine whether particular conduct is actionable, a court must consider whether under all the circumstances the conduct is "so severe or pervasive that it create[s] a work environment abusive to employees because of their . . . gender."[31] This variable scale, however, provides employers with little firm guidance as to what constitutes actionable hostile environment harassment.[32]

Further, defining when employers will be liable for actionable conduct has been a source of confusion since the Supreme Court announced in *Meritor* that when determining liability courts should be guided by general agency principles, while recognizing that it might be necessary to modify the principles' application to this context.[33] This confusion persisted until the 1997-1998 Term, when the Supreme Court specifically addressed the issue in the cases of *Burlington Industries, Inc. v. Ellerth*,[34] and *Faragher v. City of Boca Raton*.[35] While it is perhaps too early to discern whether the rules laid down in these cases will fully quell the confusion in this area, this much is clear: employer response to harassment is a critical part of avoiding liability.[36]

Thus, in evaluating the first side of the paradox—attempting to eliminate hostile environment sexual harassment—a two-step analysis

30. This was first recognized by the Supreme Court in 1986, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). As noted earlier, hostile environment sexual harassment is also prohibited by a number of other statutes, notably Title IX. *See supra* note 12. Although there are some differences, actions brought under these statutes generally follow Title VII standards in determining whether sexual harassment occurred. *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1997-98 (1998); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996); Lipsett v. University of P.R., 864 F.2d 881, 896-97 (1st Cir. 1988). These differences, however, do not eliminate the employer's paradox as discussed herein.

31. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

32. In his concurring opinion in *Harris*, Justice Scalia noted:

> "Abusive" (or "hostile," which in this context I take to mean the same thing) does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb "objectively" or by appealing to a "reasonable person['s]" notion of what the vague word means. Today's opinion does list a number of factors that contribute to abusiveness, . . . but since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude.

510 U.S. at 24 (Scalia, J., concurring).

33. The Court noted, "such common-law principles may not be transferable in all their particulars to Title VII." *Meritor*, 477 U.S. at 72.

34. 118 S. Ct. 2257 (1998).

35. 118 S. Ct. 2275 (1998).

36. Both cases adopted a standard of vicarious liability for harassment committed by supervisors while creating an affirmative defense for employers, available under certain circumstances, that relies in part on a demonstration that the employer acted promptly and appropriately to end the harassment. *See infra* Part III.B.2.

is needed. First, does the conduct at the workplace create a legally cognizable hostile environment due to sexual harassment? Second, is the employer liable for such harassment? Unfortunately, for the employer, victim, and alleged harasser, these are not simple questions to answer.

B. *Recognizing Hostile Environment Sexual Harassment*

Employer liability for hostile environment sexual harassment did not exist until the EEOC issued its Guidelines on Discrimination Because of Sex ("Guidelines")[37] in 1980 in which it defined sexual harassment to include hostile environment under Title VII. The Guidelines state in part:

> (a) Harassment on the basis of sex is a violation of section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) *such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.*[38]

Subsection 3 of the Guidelines went beyond what courts had previously held illegal by recognizing that the creation of a sexually hostile environment was also violative of Title VII. Courts were quick to follow, however, as the first court of appeals case to recognize a hostile environment based on sexual harassment was decided in 1981.[39]

In its 1986 landmark *Meritor* decision, the Supreme Court recognized the illegality of hostile environment sexual harassment.[40] The Court further clarified the evidence needed to establish a hostile environment violation, holding that the harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employ-

37. 29 C.F.R. § 1604.11 (1997). The EEOC is the agency charged with interpreting and enforcing Title VII. While not binding, the courts routinely look to the EEOC's interpretation of Title VII for guidance. *See* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

38. 29 C.F.R. § 1604.11(a) (emphasis added and footnote omitted).

39. *See* Bundy v. Jackson, 641 F.2d 934, 943-46 (D.C. Cir. 1981). While *Bundy* was the first circuit court case to recognize a sexually based hostile environment, the notion that a hostile environment violates Title VII had previously been recognized in the area of national origin and race. *See, e.g.*, Rogers v. EEOC, 454 F.2d 234, 239 (5th Cir. 1971) (stating that a working environment fraught with discrimination may be an unlawful practice). Other circuits soon followed the *Bundy* decision. *See* Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982).

40. 477 U.S. 57, 64-67 (1986).

ment and create an abusive working environment.'"[41] Despite the clarification provided by the Court, however, lower courts have developed vastly conflicting standards for determining what constitutes hostile environment sexual harassment, making it difficult—even for an employer diligently trying to comply—to know when it will be subjected to liability.

The most commonly accepted statement of the elements of a hostile environment claim was set out by the Eleventh Circuit in *Henson v. City of Dundee*.[42] Those elements are: (1) the employee belongs to a protected class; (2) the employee was subject to harassment, that is, unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment, that is, the conduct was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) a basis for employer liability.[43] The first four elements pertain to part one of the employer's two-step analysis: establishing the existence of a hostile environment. Yet, little is clear in this area because there are areas of conflict regarding each of the elements.

41. *Id.* at 67 (quoting *Henson*, 682 F.2d at 904). The nature of this showing was again addressed by the Court in its 1993 decision *Harris v. Forklift Systems, Inc.*, although this was done in broad and malleable terms. 510 U.S. 17, 22-23 (1993). As a result, employers have few bright lines when evaluating whether a particular situation will constitute actionable hostile environment harassment. The Court in *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2265 (1998), further muddied the waters, and the lower courts must now grapple with the question of when threats and/or submission will constitute a sufficiently severe or pervasive hostile environment.

In *Burlington*, the plaintiff sued her employer under a quid-pro-quo theory based, among other things, on unrealized threats of an adverse employment action. *See id.* at 2263. The Court, however, held this type of threatening conduct constituted only a hostile environment claim and not a Title VII claim, requiring a showing that the conduct was sufficiently severe or pervasive. *See id.* at 2265. The Court did not discuss whether the analysis for hostile environment based on threats would be any different than that for other types of offensive conduct, but rather relied on the lower court's finding that the action at issue was sufficiently severe or pervasive. *See id.* The *Burlington* Court specifically expressed no opinion as to whether a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment. *See id.* For reasons discussed in part II.B.4, I submit that a sufficiently severe hostile environment is created whenever sexual demand is coupled with a threat of adverse employment action, regardless of whether the victim rejects it or accedes to it.

42. 682 F.2d at 903. Most circuits use the *Henson* formulation or some variation of it. *See, e.g.*, Hall v. Gus Constr. Co., 842 F.2d 1010, 1013 (8th Cir. 1988) (following *Henson*); Swentek v. USAir, Inc., 830 F.2d 552, 557 (4th Cir. 1987) (same); Rabidue v. Osceola Refining Co., 805 F.2d 611, 619-20 (6th Cir. 1986) (same); Jones v. Flagship Int'l, 793 F.2d 714, 719-20 (5th Cir. 1986) (same).

43. *See Henson*, 682 F.2d at 903-05.

1. Protected Class/Based on Sex

At first blush, the first and third elements—that the employee belong to a protected class and that the harassment be based on sex—would appear to be non-controversial. These elements are related in that membership in the class and the basis for the harassment must coincide for harassment to be actionable. For example, a woman is a member of a protected class because of her gender (female) and she is harassed on that same basis—gender (female).[44] Where heterosexual conduct was involved, courts had little difficultly in holding that sexual words or conduct was based on sex.[45]

Problems arose and the circuits split, however, when the alleged actions occurred among members of the same gender.[46] In *Oncale v. Sundowner Offshore Services, Inc.*,[47] the Supreme Court addressed this issue of same-sex sexual harassment, and it held that such harassment was indeed actionable.[48] In doing so, the Court reaffirmed that sexual harassment must be based on sex and not merely words or conduct sexual in nature.[49]

The Court left unresolved, however, the issue of what role, if any, sexual orientation of the victim plays in this analysis. While the Court recognized that an inference of discrimination could be made on a sexual attraction theory if "there were credible evidence that the harasser was homosexual,"[50] it did not address the issue of the victim's sexual orientation, even though there was some evidence that Oncale was being harassed because he was perceived as being homosexual.[51] Since discrimination based on sexual orientation is not a violation of Title VII,[52] and presumably harassment on this basis is similarly not

44. In fact, all individuals have protected group status in several respects: all individuals have a race, a gender, a national origin, and a religion. Proof of discrimination, however, necessarily requires a nexus between the particular group membership and the act of discrimination: the discrimination must be based on the group membership. Thus, for example, a person may claim protected group membership based on race, and allege that she was discriminated against because of her race. She may not, however, claim protected class status based on religion, but then allege race-based discrimination.

45. *See, e.g.*, Doe by Doe v. City of Belleville, 119 F.3d 563, 574 (7th Cir. 1997) (noting that the requirement that the discrimination be "because of gender" has not affected courts in cases of opposite-sex harassment since it is generally accepted that when a female employee is harassed in explicitly sexual ways by a male worker she has been discriminated against "because of" her sex), *vacated*, 118 S. Ct. 1183 (1998).

46. *Compare* Quick v. Donaldson Co., 90 F.3d 1372 (8th Cir. 1996) (holding same-sex harassment actionable), *with* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996) (holding same-sex heterosexual sexual harassment claims not actionable).

47. 118 S. Ct. 998 (1998).

48. *See id.* at 1002.

49. *See id.*

50. *Id.*

51. *See id.* at 1001.

52. *See* Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (holding that homosexuality is not a status protected under Title VII); DeSantis v.

prohibited, it is unclear whether overt sexual conduct accompanied by orientation-specific derogatory language would be actionable.[53]

The status of the law leaves an employer relying on a policy that generally prohibits "sexual harassment" as defined by Title VII in the precarious position of having to know the employees' sexual orientation to determine whether the policy is being violated.[54] Inquiries into such private matters, however, clearly invade the privacy of the employees, and invite a collateral action alleging such invasion.[55]

2. Unwelcomeness

Even greater difficulties exist in determining whether the remaining elements of a hostile environment claim are present. The simple phrase "unwelcome sexual advances" is replete with problematic interpretive issues. Indeed, the first word alone—unwelcome—causes great controversy.[56] Yet, because of the nature of sexuality, it is a necessary element. Clearly, not all sexual advances are unwelcome,

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Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) (same). *But see* Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 Stan. L. Rev. 691 (1997) (arguing that discrimination based on sexual orientation should be a violation of Title VII).

53. Thus, for example, in an all male environment, an individual singled out and subjected to a campaign of sexually overt harassing conduct could compare his treatment to that of females to establish that the conduct is "based on sex." Nor could he rely on the sexual nature of the conduct to establish this element, particularly if the conduct is accompanied by epithets or banter relating to sexual orientation.

Moreover, since *Oncale* required a showing of difference in treatment based on gender, further complications arise in cases where the harasser is bisexual. The District of Columbia Circuit long ago recognized these difficulties in *Barnes v. Costle*, when it suggested in dicta that harassment by a bisexual would never be actionable. 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) ("In the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike."). More recently, the District Court for the District of Columbia, in *Ryczek v. Guest Services, Inc.*, 877 F. Supp. 754 (D.D.C. 1995), commented on the "practical flaw in this Circuit's interpretation of Title VII": "any defendant could avoid Title VII liability for sexual harassment by claiming to be a bisexual or by harassing members of both sexes." *Id.* at 762. Again, however, it is not clear how this outcome would be affected by *Oncale*, since it specifically endorses comparative treatment as proof that the harassment was based on sex and questions reliance on the mere sexual nature of the words or conduct.

54. The lack of clarity is particularly problematic when the employer's policy simply bans "sexual harassment" or tracks the language in the EEOC guidelines and employees have direct appeal rights tied to a requirement of just cause. Because under just cause the employer bears the burden of proving an actual violation, not just its good faith belief that there was a violation, *see infra* Part IV.B., the vagueness of the law clearly plunges the employer into a quagmire.

55. Of course, employers in states or municipalities which include sexual orientation as a basis for a charge of discrimination would include such acts in its policy; also some employers may chose to include this type of harassment on their own, regardless of federal or state law simply to avoid the privacy issues involved.

56. The Supreme Court recognized the difficulty in determining this factor when it first considered hostile environment sexual harassment in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986) (noting that the determination of whether the conduct was unwelcome did not turn on simple voluntariness, but rather presented "difficult problems of proof").

and romance in the workplace abounds.[57] The individual's attitude towards a sexual advance can range from invited, to uninvited but welcome, to undesirable but tolerated, to unwelcome.[58]

The Supreme Court discussed the concept of unwelcomeness in *Meritor*.[59] In upholding the appellate court's reversal of the district court, the Supreme Court held that focusing on "voluntariness" was improper: "[t]he fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII."[60] The Court framed the correct inquiry as being whether the victim "by her conduct indicated" that the sexual advances were unwelcome, and noted that one relevant consideration was the victim's "sexually provocative speech or dress."[61]

The use of the victim's conduct to infer welcomeness is problematic, however, particularly where the claim does not involve touching, but rather is based primarily on abusive and offensive language and con-

57. In discussing the complex nature of sexual harassment and its connection to voluntary romantic relationships, one court commented:

> On the one hand, courts are understandably reluctant to chill the incidence of legitimate romance. People who work closely together and share common interests often find that sexual attraction ensues. It is not surprising that those feelings arise even when one of the persons is a superior and the other is a subordinate. . . . We spend longer hours at the office or traveling for job-related purposes, and often discover that our interest and values are closer to those of our colleagues or fellow employees than to those of people we meet in connection with other activities. In short, increased proximity breeds increased volitional sexual activity.

Nichols v. Frank, 42 F.3d 503, 510 (9th Cir. 1994). Further, according to a survey published in Psychology Today, 80% of employees have participated in or know of an office romance. Mary Loftus, *Frisky Business*, Psychol. Today, Mar.-Apr. 1995, at 34, 36.

58. *See Barnes*, 561 F.2d at 999 (MacKinnon, J., concurring). The court in *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), was aware of this problem and noted, "[t]he man must be sensitive to signals from the woman that his comments are unwelcome, and the woman, conversely, must take responsibility for making those signals clear." *Id.* at 898; *see also* Eleanore K. Bratton, *The Eye of the Beholder: An Interdisciplinary Examination of Law and Social Research on Sexual Harassment*, 17 N.M. L. Rev. 91, 98-101 (1987) (noting the disparity between men's and women's perceptions of what constitutes sexual conduct); *cf.* Robin D. Wiener, Note, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 Harv. Women's L.J. 143, 147-49 (1983) (describing the "gender gap in sexual communications").

59. 477 U.S. at 68-69. The victim alleged that she capitulated to the sexual demands of her supervisor for fear of losing her job. *See id.* at 60-61. The existence of the relationship was hotly contested. *See id.* at 61. Rather than make a determination as to its existence, however, the district court found that "[i]f [Vinson] and Taylor did engage in an intimate or sexual relationship during the time of [Vinson's] employment [at the bank], that relationship was a voluntary one by plaintiff having nothing to do with her continued employment [at the bank] or her advancement or promotions at that institution." Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 42 (D.D.C. 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985).

60. *Meritor*, 477 U.S. at 68.

61. *Id.* at 68-69.

duct. When the victim is a stereotypically demure woman, who "acts like a lady," recognition that workplace vulgarities are "unwelcome" is likely to occur.[62] In contrast, a plaintiff who uses sexually oriented profanity, tells or laughs at sexually oriented jokes, and participates in general undirected sexual banter is sometimes viewed as having opened the door to more severe abusive conduct specifically directed at her.[63]

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62. On the other hand, it may lead the woman to be seen as an outsider who does not belong. *See* Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1515 (M.D. Fla. 1991) (accounting numerous incidents of sexual harassment against a female shipfitter and how when she complained to her supervisor his response was that the shipyard was a "man's world").

63. For example, in *Weinsheimer v. Rockwell International Corp.*, 754 F. Supp. 1559 (M.D. Fla. 1990), *aff'd*, 949 F.2d 1162 (11th Cir. 1991), the plaintiff (Weinsheimer), a foul-mouthed and aggressive woman, had continuous problems with a male co-worker whose work she inspected. Among other things, he told her several times a week to "suck him" and to "give him head." *Id.* at 1561. He also flashed a knife he used in his job, and, according to Weinsheimer, once held the knife to her throat. *See id.* The court found that the co-worker's language and behavior was "based not upon sex, but rather upon work or personal disputes." *Id.* at 1565 n.15. The plaintiff's many complaints were largely ignored by a supervisor who did not believe her complaints were serious, in part because of her general demeanor. *See id.* at 1564. Astoundingly, the court, instead of viewing Weinsheimer's complaints as evidence that the conduct was unwelcome, viewed the fact that the supervisor did not take her seriously as evidence that her complaints were not serious. *See id.* Having discounted Weinsheimer's complaints, the court then used her participation in shop banter and boisterous, expletive-filled telephone conversations with her boyfriend as a basis for finding that she had not sustained her burden of proving that the conduct was unwelcome. *See id.* at 1565-67.

A contrary result was reached in *Carr v. Allison Gas Turbine Division, General Motors Corp.*, 32 F.3d 1007 (7th Cir. 1994), where the plaintiff, the first and only woman tinsmith, regularly used sexual terms and expletives and was receptive to sexually oriented jokes and banter. The plaintiff's male co-workers made numerous statements, such as, "I won't work with any cunt," *id.* at 1009, and continually referred to her as a "'whore,' 'cunt' and 'split tail.'" *Id.* Further, they defaced her toolbox with sexually oriented graffiti and painted it pink. *See id.* The Seventh Circuit held that the males' specifically targeted language and actions crossed the line that separates "merely vulgar and mildly offensive" shop talk from that which is "deeply offensive and sexually harassing." *Id.* at 1010. Moreover, the court rejected the argument that had the plaintiff been "ladylike," the hostile environment would not have occurred, finding it difficult to imagine a situation "in which male factory workers sexually harass a lone woman in self-defense" of the woman's use of expletives. *Id.* at 1011 (emphasis omitted). Other courts have also not been so harsh to hard-edged plaintiffs. In *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987), for example, the plaintiff was described as "a foul-mouthed individual who often talked about sex." *Id.* at 557. Notwithstanding this characterization, the court of appeals reversed the lower court's holding that a co-worker's use of foul language and singing of lewd limericks was "not unwelcome." *Id.* The court noted that Swentek told the co-worker to leave her alone, and reasoned that the use of foul language or sexual innuendo in a consensual setting "does not waive 'her legal protections against unwelcome harassment.'" *Id.* (quoting Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983)). Critical to its holding, however, was a finding that the alleged harasser did not know of the plaintiff's prior conduct, *see id.*, leaving open the possibility that she might not have been able to prove unwelcomeness had the same conduct been carried out by a different person.

Thus, employers relying on Title VII for clarification of the term "unwelcome" are once again left with confusing and contradictory standards, in large part because the analysis depends on the victim's character and background. The "welcomeness" issue would be easier if all women employees were in fact stereotypically demure and complained immediately. There are women, however, who use profanity as expletives and enjoy sexual banter and jokes.[64] In such cases, courts have had wide-ranging findings: one found the woman to have welcomed the conduct; one found the woman not to have welcomed it; and a third found that its decision apparently depended upon whether the accused harasser knew of the victim's background.[65] Thus, this element can also cause employers great difficulty, particularly if the harassment takes place over a long period of time, is easily observable, and is never the subject of a complaint.[66]

3. Conduct of a Sexual Nature

While the phrase "sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature" appears clear, complications arise in determining just what type of conduct is covered by this phrase. One might think that a determination of whether the conduct at issue is "sexual" is required. It has long been clear, however, that the use of the term "sexual" is somewhat of a misnomer: courts have found that conduct which is not at all sexual in nature can create a hostile environment, particularly when it is mixed with either sexual or sexist conduct or speech.[67] The category of non-sexual conduct that constitutes actionable harassment—sometimes

64. *See, e.g.*, *supra* note 63 (discussing several cases in which the women plaintiffs often acted in "unladylike" ways).

65. *See supra* note 63 (discussing these cases).

66. Since an employer can be found liable based on conduct about which it "should have known," *see infra* notes 113-15 and accompanying text, this situation is troublesome if the employer's agent fails to perceive the conduct as sexual harassment. In *Carr*, for example, the plaintiff's supervisor testified that he observed some of the offensive conduct, but "not being a woman himself he was not sure that the statements would be considered offensive by a woman." *Carr*, 32 F.3d at 1010.

67. Thus, when coupled with blatantly sexual conduct or words, courts have found that acts as diverse as using non-sexual physical force, *see* McKinney v. Dole, 765 F.2d 1129, 1137 (D.C. Cir. 1985), urinating in the gasoline tank of a female co-worker's car, *see* Hall v. Gus Constr. Co., 842 F.2d 1010, 1012 (8th Cir. 1988), failing to repair a woman's equipment, *see id.*, and forcing a woman to sit on a wet seat, *see* Hicks v. Gates Rubber Co., 833 F.2d 1406, 1409 (10th Cir. 1987), are appropriately considered when evaluating whether "sexual" harassment has caused a hostile environment.

I use the term "sexist" speech, as opposed to "sexual" speech, to refer to comments that denigrate women based on stereotypes about women that are not sexual in nature. For instance, in *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), statements by male residents that women would not make good surgeons because they spent too much time putting on makeup could be said to be sexist, not sexual, speech. *See generally* Marcy Strauss, *Sexist Speech in the Workplace*, 25 Harv. C.R.-C.L. L. Rev. 1, 6-8 (1990) (discussing several categories of sexist speech).

still referred to as sexual harassment, but more accurately labeled gender harassment—continues to expand.[68]

The danger for employers, however, is that supervisors and potential harassers will fail to recognize non-sexual conduct as being within the realm of sexual harassment.[69] Individuals who engage in such conduct and are then disciplined for "sexual harassment" may file a grievance, claiming a lack of fair dealing based on incomplete notice of what type of conduct is prohibited.

4. Sufficiently Severe or Pervasive

Perhaps the most difficult element in determining whether a hostile environment constitutes actionable sexual harassment is the requirement that the harassment be objectively "sufficiently severe or pervasive 'to alter the conditions of . . . employment and create an abusive working environment,'"[70] and in fact have subjectively done so to the victim.[71] The objective standard raises the question of perspective—

68. For example, in *Spain v. Gallegos*, 26 F.3d 439 (3d Cir. 1994), the Third Circuit reversed an order of summary judgment against a sexual harassment claim based on false rumors that the plaintiff was having an affair with her supervisor. *See id.* at 451-52. The rumors allegedly started because the supervisor spent time alone with the employee, constantly pressuring her to loan him money. *See id.* at 442. The court reasoned that because a male who spent an inordinate amount of private time with a supervisor would not be viewed by co-workers as using his sexuality to get ahead, the resulting hostile environment—which included being shunned by her co-workers and receiving a low rating for ability to get along with co-workers—was based on sex. *See id.* at 448.

In *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683 (1998), Professor Vicki Schultz argues that this area should be expanded even further, so that the aggregate environmental effects of all types discrimination traditionally analyzed as disparate treatment be simultaneously considered under a hostile environment paradigm. *See id.* at 1769-74. Accordingly, one's subjection to non-sexual discriminatory conduct could be the basis of a hostile environment claim in addition to whatever traditional claim is warranted. I agree that all such harassing conduct should be considered—alone or in tandem with evidence of sexual misconduct—when determining whether a work environment is hostile. As noted above, a few courts have acted on that basis. However, to avoid confusion, such harassment should be considered "gender-based" harassment actionable to the same extent that similar types of harassment would be actionable if committed on some other prohibited basis, such as race or ethnicity. To characterize such conduct as "sexual" is misleading, since most use of the term "sexual" are referring in some way to things related to sexuality, as opposed to gender. To the extent that such conduct would be actionable, it should be clearly delineated in the employer's anti-harassment policy.

69. Indeed, requiring that the conduct be "because of sex" and "of a sexual nature" disjunctive, as opposed to conjunctive, not only would result in less ambiguity to a lay person reading the regulation (or the anti-harassment policy parroting the regulation), but also would resolve many of the issues surrounding same-sex harassment. Under such a policy, unwelcome conduct that was either (1) of a sexual nature or (2) based on sex would be prohibited if that conduct was sufficiently severe or pervasive to alter working conditions and create a hostile environment.

70. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

71. In *Harris v. Forklift Systems, Inc.*, the Court upheld the requirement that the conduct be measured both objectively and subjectively, stating:

from whose perspective is the conduct evaluated.[72] Even if that matter is resolved, however, the conduct must still be evaluated in light of the "totality of circumstances"—under which several additional, nondispositive factors are considered.[73] The additional requirement that the victim have been subjectively offended by the conduct may put the employer in the difficult position of having to read the mind of the victim. As with unwelcomeness,[74] the employer's evaluation of this factor may be based on unfair stereotypes about women.

Although the Supreme Court had the opportunity to clarify some of these issues in *Harris v. Forklift Systems, Inc.*,[75] it did not do so.[76] The Sixth Circuit had required proof that the harassing conduct caused severe psychological harm to the victim in order to be actionable, and the court had concluded that Harris, in a close case, had failed to meet this standard.[77] Specifically rejecting that approach, the Supreme Court has instead approved a "middle path,"[78] defining the threshold for actionable conduct as falling somewhere between that which is "merely offensive" and that which causes "tangible psychological injury."[79] It further stated that this determination was to be made by evaluating all the circumstances, including: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[80]

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

510 U.S. 17, 21-22 (1993).

72. Reasonable-person, reasonable-victim, and reasonable-woman are all standards that have been endorsed by various courts. *See infra* notes 89-90 and accompanying text.

73. *See infra* notes 80-84 and accompanying text.

74. *See supra* Part II.B.2.

75. 510 U.S. 17 (1993).

76. In *Harris*, the victim, Teresa Harris, was subjected to various sexist comments by Charles Hardy, her boss and the president of the company. Among the statements made publicly to Harris were, "You're a woman, what do you know," and "We need a man as the rental manager." *Id.* at 19. Further, Hardy suggested to Harris that the two of them "go to the Holiday Inn to negotiate [Harris's] raise," and asked Harris if she had promised a client sex. *Id.* Finally, Hardy required Harris and other women to pick up objects he purposefully threw on the floor in front of his desk, and to pick coins out of his front pockets. *Id.*

77. *See id.* at 21-30.

78. *Id.* at 21.

79. *Id.*

80. *Id.* at 23. Notwithstanding these guidelines, it remains difficult to determine whether conduct is sufficiently severe or pervasive to be actionable.

When evaluating these various factors, the interrelation between them must also be considered.[81] Of particular import is the interrelationship between the severity and pervasiveness (frequency) of the conduct. Courts have held that the importance of these factors varies inversely: the more severe (serious) the conduct, the less pervasive (frequent) it need be to constitute a violation.[82] Thus, a single sufficiently severe incident may create a hostile environment.[83] Conversely, less serious conduct may become actionable if it occurs frequently enough.[84] In a sense, less serious but very frequent conduct is more problematic, because the employer may fail to recognize the possibility that seemingly insignificant conduct may be catapulted into the realm of hostile environment based on its frequency.

Thus, it appears that the Supreme Court's "middle path" is akin to a multi-laned super highway. The extreme boundaries are defined: on one side, "merely" offensive conduct is not actionable; on the other side, psychologically debilitating conduct is actionable. What is sufficient between those two points, however, is anybody's guess. Justice Scalia recognized this ambiguity and commented in his concurring opinion in *Harris*: "As a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages."[85]

Harris did not resolve from whose perspective the court is to objectively evaluate the conduct.[86] The circuits remain fractured on that

81. Viewing all of the circumstances, as directed by the Supreme Court in *Harris*, *id.* at 23, necessarily implies viewing the various factors in tandem with one another.

82. *See* Ellison v. Brady, 924 F.2d 872, 877-78 (9th Cir. 1991).

83. *See, e.g.*, King v. Board of Regents, 898 F.2d 533, 537 (7th Cir. 1990) ("Although a single act can be enough, generally, repeated incidents create a stronger claim of hostile environment . . . ." (citation omitted)).

84. While finding the particular conduct at issue not actionable, the court in *Schweitzer-Reschke v. Avnet, Inc.*, 874 F. Supp. 1187 (D. Kan. 1995), noted that less severe conduct may become actionable if it is so frequent and pervasive that it affects the employee's environment. *See id.* at 1193.

85. Harris v. Forklift Sys., Inc., 510 U.S. 17, 24 (1993) (Scalia, J., concurring). The tremendous discretion given to the jury was also recognized in *Baskerville v. Culligan International Co.*, 50 F.3d 428 (7th Cir. 1995), where the court noted that the "'line that separates the merely vulgar and mildly offensive from the deeply offensive and sexually harassing'" is "obviously" not bright and that where uncertainty exists, the jury must decide. *Id.* at 431 (quoting Carr v. Allison Gas Turbine Div., 32 F.3d 1007, 1010 (7th Cir. 1994)).

86. The Court in *Harris* used the phrase "reasonable person," *Harris*, 510 U.S. at 22, without comment or analysis. Subsequent lower court cases have continued to follow the precedent in their circuit or have decided the issue for themselves if no such precedent exists. *See, e.g.*, Currie v. Kowalewski, 842 F. Supp. 57, 63 (N.D.N.Y.) (noting that *Harris* did not decide whether a reasonable person or reasonable woman standard would apply), *aff'd*, 40 F.3d 1236 (2d Cir. 1994). Moreover, *Oncale* did not specifically address the question of perspective, but the Court again referred to the reasonable person "in the plaintiff's position, considering 'all the circumstances.'" Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1003 (1998) (quoting *Harris*, 510 U.S. at 23).

important issue.[87] In fact, the range of the perspectives which have been accepted by the various circuits is quite dramatic: at one end, the actions have been judged from the perspective of a reasonable person living in a society where "sexual jokes, sexual conversations and girlie magazines . . . abound";[88] at the other end, the conduct is judged from the perspective of a reasonable woman, which may make "[w]ell-intentioned compliments by co-workers or supervisors"[89] actionable conduct if a reasonable woman would consider the comments sufficiently severe or pervasive.[90]

These variations in standards have led to tremendous discrepancies in the type of conduct found to sufficiently satisfy the objective prong of the "severe and pervasive" requirement. Clearly, repeated blatant sexual touching will be sufficient, and infrequent innocuous words will be insufficient. Aside from that, little can be said. Even blatant sexual touching,[91] which one would think would always create a hostile environment, has been treated inconsistently and is not automatically deemed sufficiently severe to create a hostile environment.[92] Middle

87. *See* Leslye M. Fraser, *Sexual Harassment in the Workplace: Conflicts Employers May Face Between Title VII's Reasonable Woman Standard and Arbitration Principles*, 20 N.Y.U. Rev. L. & Soc. Change 1, 6-11 (1992-93) (explaining how the reasonable-woman standard may make it easier for women to sucessfully bring hostile environment claims).

88. Rabidue v. Osceola Refining Co., 805 F.2d 611, 620-21 (6th Cir. 1986). The Sixth Circuit quickly backed away from that extreme standard the following year in *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987). In support of its decision to use a reasonable-woman standard in determining whether a victim of sexual harassment was constructively discharged, the court cited Judge Keith's dissent in *Rabidue* and acknowledged "that men and women are vulnerable in different ways and offended by different behavior." *Id.* at 637 n.2. Other courts, however, continue to use the reasonable person standard. *See, e.g.*, Brooms v. Regal Tube Co., 881 F.2d 412, 418-19 (7th Cir. 1989) (considering the likely effect of a defendant's conduct upon a reasonable person's ability to perform her or his work).

89. Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991).

90. While widely denoted a "reasonable-woman" standard, the standard actually looks at the reasonable person of the victim's sex. The *Ellison* court noted that "where male employees allege that co-workers engage in conduct which creates a hostile environment, the appropriate victim's perspective would be that of a reasonable man." 924 F.2d at 879 n.11; *see also Yates*, 819 F.2d at 637 n.2 (noting that a reasonable-man standard would apply to case involving harassment of a male). The paradox of a reasonable "victim" standard, however, is that it creates the danger of reinforcing stereotypes. Does it mean that a man would lose if he is subjectively offended by on-the-job conduct that would offend a (stereotypically) reasonable woman, but not a (stereotypically) reasonable man? It would seem more logical to have a unified objective threshold standard based on a reasonable woman's perspective. Since subjective offense is also an element, employers would still be protected against frivolous suits, and both men and women could be assured of working in an environment that is not sexually hostile.

91. By blatant sexual touching, I mean unwelcome, intentional touching of another person's crotch, upper-inner thigh, buttocks, or breasts. I use the term quasi-sexual touching to refer to touching of another person's knees, and other touching which is sustained and involves movement (such as massages and rotating hips).

92. In *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 210-11 (7th Cir. 1986), occasional slapping on the buttocks by a co-worker was found insufficient. Similarly, in

ground cases have fallen on both sides of the line, and management officials simply cannot predict whether any particular conduct is actionable harassment or is not actionable because it is "merely offensive" or only "infrequently" hostile.[93]

Finally, in addition to being sufficiently severe or pervasive from an objective viewpoint, the harassing conduct must also be subjectively offensive and abusive—that is, it must have actually offended the victim. Analysis of this issue frequently involves problems similar to

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Christoforou v. Ryder Truck Rental, Inc., 668 F. Supp. 294 (S.D.N.Y. 1987), several instances of sexual touching, pestering, and asking for dates was deemed too infrequent to be cognizable sexual harassment. *See id.* at 298-300. Consider the facts of *Hosey v. McDonald's Corp.*, 71 Fair Empl. Prac. Cas. (BNA) 201 (D. Md. 1996), *aff'd*, 113 F.3d 1232 (4th Cir. 1997), in which a teenage male promptly complained when a female co-worker propositioned him numerous times and pinched or patted him on the buttocks on approximately ten occasions. *See id.* at 202. In granting the defendant summary judgment, the court noted that it was common for teenagers to ask each other for dates and to use unprofessional language. *See id.* at 203. The court further found that the pinching in and of itself was not sufficiently severe to create a hostile environment, and that the few times such action occurred was not sufficiently pervasive. *See id.* Yet the court in *Campbell v. Kansas State University*, 780 F. Supp. 755 (D. Kan. 1991), found that slapping the plaintiff on her buttocks and threatening to repeat that conduct was cognizable, stating that such "patently abusive and offensive" behavior was sufficient even though it occurred only infrequently and for a short period. *Id.* at 762.

93. For examples of legally insufficient conduct, see *Dellert v. Total Vision, Inc.*, 875 F. Supp. 506, 508 (N.D. Ill. 1995) (ruling on a case in which the female employee of an eyeglass store was told by superior that the glasses would look better if she did not have a skirt on and that he would have to "jump her" if she ever posed in a manner depicted in their advertising), and *Schweitzer-Reschke v. Avnet, Inc.*, 874 F. Supp. 1187, 1190 (D. Kan. 1995) (ruling on a case in which a female employee was told to suck-up, kiss-ass, wear shorter skirts, bat eyes, and flirt to get special pricing). *But see* Guiden v. Southeastern Pub. Serv. Auth., 760 F. Supp. 1171, 1178-79 (E.D. Va. 1991) (finding that a female employee—who was asked whether she was "going hooking," and told by a co-worker that she was wearing a padded bra and that he wanted her body—had established sufficiently actionable conduct, even in the absence of any physical contact).

It is difficult, however, to discern the circumstances under which a single threat would not constitute action severe enough to constitute an actionable hostile environment. When a threat is made by a supervisor who has the authority to carry it out, the victim may react two different ways: she may refuse the demand, or she may, if desperate to maintain employment, accede to the demand. If she refuses the demand, she has no way of knowing whether the threat will be fulfilled; she cannot see into her harasser's mind to know the threat was empty. Consequently, while the single threat itself may seem to be an isolated incident, the poisonous environment it creates may continue for some undefined time until the victim can regain confidence that it will not be carried out. Moreover, during this time, her work may suffer or she may feel that legitimate criticism of her work is execution of the threat. In short, while the threat may take only a moment, the effect of even a single threat is likely to be long-lasting.

On the other hand, the victim may accede to the threat. Obviously, even a single unwanted, coerced sexual encounter can have long lasting effects on the victim. Moreover, as with the unfulfilled threat, the victim will not know if and when another demand will be forthcoming, so that a single act can poison the victim's work atmosphere for a period of time.

those surrounding the analysis of unwelcomeness:[94] if the victim is a stereotypical woman—a demure, soft-spoken individual—subjective offense is easily found. Subjective offensiveness, however, becomes substantially more difficult to establish when the victim does not fit that stereotype. Unfortunately, the incidence of harassment is highest in blue collar occupations previously dominated by males. Yet it is in these fields that a woman is less likely to register a complaint and more likely to tolerate offensive conduct, or even participate in it, in an effort to "fit in."[95] This "go along to get along" plaintiff will often find her previous tolerance and efforts to fit in used against her.[96]

Considering the wide disparity in the courts' treatment of each and every element of a hostile environment sexual harassment claim, employers may have difficulty in determining whether conduct amounting to legal hostile environment "sexual harassment" has occurred even in the most obvious and blatant cases. Thus, the use of the term "sexual harassment," even with reference to the EEOC guidelines, is quite simply inadequate to put employers and supervisors on notice as to when they must act. This difficulty for employers in properly handling situations of sexual harassment is further exacerbated by the uncertain standards of employer liability for sexual harassment.

III. Employer Liability

The second step in determining whether an employer faces the paradox which begins the descent into the labyrinth is evaluating employer liability.[97] After all, it is the probability of liability that prompts the employer, at least in part, to take disciplinary action that the alleged harasser may later challenge. Moreover, the determination of what kind of action the employer takes depends upon the employer's view of liability: if the employer believes that it will not be held liable for the hostile harassment, it may opt to take less drastic steps against the alleged harasser in order to avoid an angry man challenge.[98] On the other hand, if the employer is sure that the conduct constitutes harassment (not necessarily an easy determination), the probability of liability—which could potentially lead to a multi-million dollar verdict[99]—shifts the balance and could lead to more drastic ac-

94. *See supra* Part II.B.2.

95. *See* Laura A. Reese & Karen E. Lindenberg, Implementing Sexual Harassment Policy 64 (1999).

96. *See supra* note 63.

97. Employer liability is also the fifth element of a hostile environment sexual harassment claim. *See supra* note 43 and accompanying text.

98. *See infra* Part IV.

99. For example, the EEOC procured a $34 million dollar settlement fund to be shared by 350 women in settling its claims of sexual harassment against Mitsubishi Motors. *See Sexual Harassment: Mitsubishi Settles EEOC Suit for $34 Million*, Daily Lab. Rep. (BNA), June 12, 1998, at AA-1. Further, a six-year legal battle or a single allegation of sexual harassment cost the law firm Baker and McKenzie $6 million in

tion against the alleged harasser. With the Supreme Court's creation, in *Burlington* and *Faragher*, of an affirmative defense for employers for harassment by supervisors against employees—a defense based, in part, on whether the employer promptly took corrective action to eliminate the hostile environment—the pressure has increased to take more drastic action.[100]

A. *Standards for Imposing Liability*

In the twelve years between the Court's brief pronouncement in *Meritor* that liability for sexual harassment should be guided generally by agency principles,[101] and the 1998 *Burlington* and *Faragher* decisions, there has been much confusion over when an employer would be liable for sexual harassment.[102] It is now clear, however, that *how* an employer acts in preventing and remedying sexual harassment is critical to whether it will be held liable.

In *Meritor*,[103] the Court gave general approval to the concept of looking to general agency principles for guidance in assessing liability

damages, fees, and costs. *See Sexual Harassment: Law Firm Pays $6 Million in Awards, Fees, Costs for Sexual Harassment by Ex-Partner*, Daily Lab. Rep. (BNA), Sept. 14, 1998, at A-8.

100. *See* Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2293 (1998); Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2270 (1998).

101. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

102. *See* Frederick J. Lewis and Thomas L. Henderson, *Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 U. Mem. L. Rev. 667 (1995); David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 Cornell L. Rev. 66 (1995).

103. In *Meritor*, the plaintiff, Mechelle Vinson, alleged that she submitted to demands for sexual favors by her supervisor, a bank branch manager, and thus engaged in intercourse with him throughout her successful four-year career at Meritor Savings Bank. 477 U.S. at 59-60. After recognizing both quid-pro-quo and hostile environment harassment as violations of Title VII, the Court noted that Vinson's claim was one of hostile environment. *See id.* at 67. The Court declined to issue a definitive rule regarding employer liability in sexual harassment cases. *See id.* at 72. The lower courts in *Meritor* had taken opposing views of employer liability. The district court opined that the employer would not be liable—even if the conduct at issue was harassment—because as Vinson had never complained about Taylor to anyone, the bank was without notice. *See* Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 41 (D.D.C. 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985). Further, the district court found that Taylor's supervisory status was insufficient to serve as a basis for imputing knowledge to the employer. *See id.* at 41-42. The court reasoned that the evidence showed only that the alleged harasser made recommendations on personnel decisions, and that it did not clarify what level of responsibility and relationship to management Taylor's title of Assistant Vice President accorded him. *See id.* at 42. Therefore, Vinson had not established that notice to the alleged harasser should amount to notice to the bank, particularly in the "unusual case[ ] of sexual harassment." *Id.*

The court of appeals reversed, holding that an employer is strictly liable for sexual harassment perpetrated or created by its supervisors, including hostile environment harassment. *See* Vinson v. Taylor, 753 F.2d 141, 149-52 (D.C. Cir. 1985). The court relied on the language in Title VII defining an employer as "a person engaged in an industry affecting commerce . . . and any agent of such a person." *Id.* at 148 (quoting

in hostile environment sexual harassment claims.[104] Specifically, the Court rejected: the court of appeals' imposition of strict liability for the conduct of supervisors;[105] the district court's suggestion that lack of notice would insulate an employer;[106] and the proposed rule that an employer be protected from liability if the alleged victim of the harassment failed to utilize an existing grievance procedure.[107] Further, the Court declined to definitively decide the scope of the employer's liability,[108] although it did "agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area."[109]

Following *Meritor*, the lower courts, in formulating their positions on liability, subsequently looked to the Restatement of Agency,[110] specifically to section 219, which provides:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
> (a) the master intended the conduct or the consequences, or
> (b) the master was negligent or reckless, or
> (c) the conduct violated a non-delegable duty of the master, or
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.[111]

In applying these principles, lower courts quickly reached a consensus on employer liability for sexual harassment in at least two situations: for quid-pro-quo harassment committed by supervisors, regardless of the employer's knowledge,[112] and for hostile environment harassment

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42 U.S.C. § 2000(e)(b) (1982)). Further, reasoned the court of appeals, the supervisor need only have a "significant degree of influence in vital job decisions," not actual authority with regard to those decisions, in order to be considered an agent capable of imposing liability on the employer. *Id.* at 150.

104. *See Meritor*, 477 U.S. at 72.

105. *See id.* ("[W]e hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors.").

106. *See id.* ("[A]bsence of notice to an employer does not necessarily insulate that employer from liability.").

107. *See id.* ("[W]e reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability.").

108. *See id.* (stating that the factual record was not sufficient to make a ruling regarding employer liability).

109. *Id.*

110. Restatement (Second) of Agency § 219 (1958).

111. *Id.*

112. Prior to *Meritor*, courts considering the question of employer liability consistently found liability for quid-pro-quo harassment. *See* Horn v. Duke Homes, Inc., 755 F.2d 599, 604-06 (7th Cir. 1985); Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 80-81 (3d Cir. 1983). Post-*Meritor* cases continued to do so. *See, e.g.*, Nichols v. Frank, 42 F.3d 503, 513 (9th Cir. 1994) (finding that a request for performance of sexual favors with a

perpetrated by non-supervisory co-workers when the employer knew or should have known about the harassment and failed to take prompt, corrective action.[113]

This standard for hostile environment claims flows in a rather straightforward manner from section 219(2)(b) of the Restatement of Agency, which imposes liability when the master (employer) was negligent or reckless.[114] With co-worker hostile environment cases, therefore, the employer is not vicariously liable for its employees' conduct, but rather is liable—if at all—only for its own misconduct in delaying or failing to take corrective action once it knew or should have known of the employees' misconduct.[115]

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discussion of job benefits or detriments in a single conversation constitutes quid-pro-quo sexual harassment); Carrero v. New York City Hous. Auth., 890 F.2d 569, 579 (2d Cir. 1989) (holding that in a quid-pro-quo sexual harassment case "the employer is held strictly liable for its employee's unlawful acts"). For example, when a supervisor discharges an employee who rebuffed sexual advances, the discharge itself is made upon the authority delegated to the supervisor by the employer. Thus, the harassing superior in quid-pro-quo cases "acts as and for the company, holding out the employer's benefits as an inducement to the employee for sexual favors." *Carrero*, 890 F.2d at 578. The gravamen of quid-pro-quo harassment, like that of other types of employment discrimination, is that an employment decision was made on a discriminatory basis. This essay, however, focuses primarily on hostile environment sexual harassment. For an in-depth analysis of quid-pro-quo sexual harassment, see Eugene Scalia, *The Strange Career of Quid-Pro-Quo Sexual Harassment*, 21 Harv. J.L. & Pub. Pol'y 307 (1998).

113. Many courts used the term "respondeat superior" liability. *See, e.g.*, Rabidue v. Osceola Ref. Co., 805 F.2d 611, 621 (6th Cir. 1986) (holding that the burden of proof for the plaintiff is to "demonstrate respondeat superior liability"); Jones v. Flagship Int'l, 793 F.2d 714, 722 (5th Cir. 1986) (defining respondeat superior liability); Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983) (holding that except in some circumstances a plaintiff must prove the "employer liable under some theory of *respondeat superior*"); Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982) (defining respondeat superior liability). However, the use of the phrase "respondeat superior" is somewhat of a misnomer in this context. As explained in *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463 (7th Cir. 1990), under a true theory of respondeat superior, the employer is vicariously liable for the wrongful conduct of its employees regardless of whether it had knowledge of the conduct. *Id.* at 465; *see also* Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 577 n.5 (10th Cir. 1990) (noting that the "negligence standard for employer liability occasionally has been mislabeled as 'respondeat superior'"). However, the knowledge/correction standard is a rather straightforward application of section 219(2)(b) of the Restatement of Agency, which imposes liability when the master was negligent or reckless. With co-worker hostile environment cases, therefore, the employer is not vicariously liable for its employees' conduct, but rather is liable—if at all—only for its own misconduct in delaying or failing to take corrective action once it knew or should have known of the employees' misconduct. *See Guess*, 913 F.2d at 464-65. Even courts imposing "respondeat superior" liability define the phrase in terms identical to or very similar to the standard cited in the text—to cover cases where the employer knew or should have known of the misconduct and failed to take appropriate corrective action. *See* Mackey v. Milam, 154 F.3d 648, 651 (6th Cir. 1998).

114. *See* Restatement (Second) of Agency § 219(2)(b) (1958).

115. *See* Ronald Turner, *Title VII and Hostile Environment Sexual Harassment: Mislabeling the Standard of Employer Liability*, 71 U. Det. Mercy L. Rev. 817, 833 (1994).

Lower courts, however, failed to agree on a single standard for employer liability for hostile environments created by supervisors, although several loosely related standards emerged. Generally, all circuits, at least under some circumstances, applied the knowledge/correction standard described above for co-workers, or some variation of that standard. The variations, however, were plentiful and confusing.[116]

For example, the Fifth Circuit adopted the knowledge/correction standard, even when the supervisor invoked his authority during the course of the harassment.[117] The Sixth Circuit used a standard focusing on (1) whether the harasser's actions were foreseeable or fell within the scope of his employment, and (2) if they were, whether the employer responded adequately and effectively to negate liability.[118] The scope of employment was determined by looking at when and where the harassment took place and whether it was foreseeable.[119] This was not, however, strict application of the Restatement in that subsequent corrective action usually does not relieve the employer from liability if the tort was committed "within the scope of employment"; in such cases, the employer is strictly liable under section 219(1).[120] As such, the Tenth Circuit disregarded section 219(1) alto-

116. I do not purport to be providing an exhaustive review of the various standards used by the 13 federal circuits. My examples are intended to illustrate the breadth of the variation which existed among courts prior to the Supreme Court's decisions in *Faragher* and *Burlington*. For a thorough review, including a circuit-by-circuit analysis, see Frederick J. Lewis & Thomas L. Henderson, *Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 U. Mem. L. Rev. 667, 687-730 (1995).

117. *See* Cortes v. Maxus Exploration Co., 977 F.2d 195, 198-99 (5th Cir. 1992) (adopting the knowledge/correction standard as an element of a claim).

118. *See* Kauffman v. Allied Signal, Inc., 970 F.2d 178, 184 (6th Cir. 1992). Additionally, if the tortious act was foreseeable, the employer could be liable for its own negligence in not taking steps to prevent it. To this extent, it seems that the existence of a sexual harassment policy, along with diligent efforts to educate all employees as to its content and to strictly enforce it, would be appropriate factors to consider in determining negligence and foreseeability. Under tort law, however, the subsequent conduct of the employer is irrelevant once the employee commits a foreseeable tort while acting in the scope of employment. It is therefore surprising that the court in *Kauffman* found that the harasser's conduct was within the scope of his employment, but then excused the company from liability based on its subsequent corrective action. *Id.* at 185. The court did not explain why the employer's corrective action negated liability; one can only assume that it was making a less-than-complete use of agency law based on the Supreme Court's admonishment in *Meritor* that agency law may not be transferable in all aspects.

Ironically, the court in *Kauffman* used the existence of the sexual harassment policy as evidence that sexual harassment was foreseeable, and thus within the scope of employment. *Id.* at 184. This approach stands in sharp contrast to the recent practice in some jurisdictions to limit liability in cases where the employer has a well-executed plan. *See infra* note 153 and accompanying text.

119. *See Kauffman*, 970 F.2d at 183.

120. The Restatement of Agency plainly states that "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Restatement (Second) of Agency § 219(1) (1958). Thus, once the Sixth Circuit in

gether, on the theory that sexual harassment would never be within the job description of any supervisor or worker in a reputable business.[121] Relying on section 219(2)(d) of the Restatement, however, the Tenth Circuit held a company strictly liable for harassment by high-level supervisors, even in the absence of notice.[122] The Second Circuit also applied dual standards depending on the harassing supervisor's rank in the employer's hierarchy and whether the supervisor used his actual or apparent authority in furthering the harassment.[123]

Finally, a few circuit courts, such as the Third Circuit in *Bouton v. BMW of North America, Inc.*,[124] shielded the employer from liability for a sexually hostile environment on the basis of the employer's consistently enforced policy against sexual harassment.[125] Considering this vast array of approaches, it is not surprising that the *en banc* circuit court decisions in *Burlington* and *Faragher* generated fifteen separate opinions.[126] It is against this backdrop of confusion that the Supreme Court decided these cases.

In *Burlington*, the plaintiff, Ellerth, alleged that she was subjected to threats of adverse job consequences by Ted Slowik, her second line supervisor and the vice president of the division in which she worked.[127] Ellerth claimed quid-pro-quo harassment,[128] under which

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Kauffman found the acts were within the scope of employment, 970 F.2d at 184, it is unclear how subsequent action could excuse the employer. The Supreme Court later struggled with this very problem in *Burlington*, but it concluded that sexual harassment would never be within the scope of employment. Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2260 (1998).

121. *See* Hicks v. Gates Rubber Co., 833 F.2d 1406, 1417-18 (10th Cir. 1987).

122. *See id.* at 1418.

123. *See* Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir. 1994) (holding employees liable if they use their actual or apparent authority to further the harassment or if they are aided in accomplishing harassment by the existence of the agency relationship); *see also* Kotcher v. Rosa & Sullivan Appliance Ctr., 957 F.2d 59, 64 (2d Cir. 1992) (recognizing that the actions of a supervisor at a sufficiently high level in the hierarchy would necessarily be imputed to the company, yet refusing to do so in this case where the home office was in one city and the harassment took place in another).

124. 29 F.3d 103 (3d Cir. 1994).

125. *See id.* at 110. The reasoning is that in light of a well-publicized and consistently applied anti-harassment policy, the victim's belief that the supervisor acted upon delegated authority was unreasonable. *See also* Farley v. American Cast Iron Pipe Co., 115 F.3d 1548, 1553 (11th Cir. 1997) (finding no liability based on constructive knowledge because of the well known and vigorously enforced anti-harassment policy which plaintiff knew of but failed to use).

126. *Burlington*, decided by the *en banc* Seventh Circuit, generated ten separate opinions. 123 F.3d 490 (7th Cir. 1997), *aff'd*, 118 S. Ct. 2257 (1998). *Faragher*, decided by the *en banc* Eleventh Circuit, generated five different opinions. 111 F.3d 1530 (11th Cir. 1997), *rev'd*, 118 S. Ct. 2275 (1998).

127. Slowik was a mid-level manager, a vice president in one of five business units within one of Burlington's eight divisions. *See Burlington*, 118 S. Ct. at 2262. Ellerth worked in a two-person office in Chicago; she reported directly to her only colleague at that location, who in turn answered directly to Slowik. *See id.* Ellerth also had occasional direct contacts with Slowik. *See id.* While on a business trip, Slowik invited Ellerth to a hotel lounge, which she felt compelled to accept. *See id.* While there, Slowik made comments about her breasts, told her she needed to "loosen up" and

courts had uniformly held employers strictly liable for the actions of their employees. The Supreme Court, however, found her claim to be one for hostile environment and recast the question to reflect the real concern: whether the employer was liable in the absence of knowledge. "The question presented on certiorari is whether Ellerth can state a claim of quid-pro-quo harassment, but the issue of real concern to the parties is whether Burlington has vicarious liability for Slowik's alleged misconduct, rather than liability limited to its own negligence."[129]

The Court analyzed the issues under the Restatement of Agency, focusing on section 219.[130] The Court first concluded that section 219(1), which pertains to acts committed while acting in the scope of employment, was not applicable, since in committing sexual harassment the supervisor is not in any way furthering the employers business.[131] The Court affirmatively stated, "[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment."[132] The Court then turned to subsection (2) of section 219, which relates to employer liability for acts committed by its employees while acting outside of the scope of employment.[133] It found two provisions applicable: subsection 219(2)(b), setting forth standards for negligence liability, and subsection 219(2)(d), setting forth standards for vicarious liability under certain circumstances.[134]

The Court found that section 219(2)(b) sets a minimum negligence standard for employer liability and noted:

> [A]lthough a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to

warned her that he could make her life at Burlington very hard or very easy. *See id.* During a promotion interview, he again told her she was not "loose enough" and then rubbed her knee. *See id.* Ellerth ultimately got the promotion. *See id.* On another occasion when Ellerth telephoned him on a business matter, Slowik told her that he did not have time for her unless she told him what she was wearing. *See id.* Shortly after Ellerth's immediate supervisor began cautioning her about her work performance, Ellerth quit. *See id.*

128. *See id.* at 2263-64.

129. *Id.* at 2265.

130. *See id.* at 2266.

131. *See id.* (stating "[t]he harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer").

132. *Id.* at 2267. A much more detailed discussion of why sexual harassment is outside of the scope of employment appears in the *Faragher* opinion. *See* Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2289-91 (1998).

133. *See Burlington*, 118 S. Ct. at 2267.

134. The Court briefly reviewed and found inapplicable subsections (a) where the employer acts with tortious intent or the employee's high rank makes him or her the company's alter ego, and (c) which involves nondelegable duties. *See id.*

> sexual harassment if it knew or should have known about the conduct and failed to stop it.[135]

The Court also discussed the circumstances under which an employer would be vicariously liable, without regard to knowledge of the harassing conduct, under section 219(2)(d), focusing specifically on whether the employee was aided in accomplishing the tort by the existence of the agency relationship.[136]

The Court concluded that although proximity and contact may afford a captive pool of potential victims, more was needed because that standard could be satisfied even where non-supervisory co-workers were the harassers.[137] Thus, the "aided in" agency standard "requires the existence of something more than the employment relation itself."[138] The most obvious class of cases where this "something more" factor exists "beyond question," according to the Court, is those where the supervisor takes a tangible employment action[139] against the subordinate victim.[140]

Beyond tangible employment actions, however, the Court also recognized that supervisors can be aided in committing their harassment merely by their supervisory status.[141] This concept, however, was

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135. *Id.* Negligence liability, which depends on the employer's failure to act in the face of actual or constructive knowledge, would not have helped Ellerth, since there was no basis for actual or constructive knowledge; Ellerth had not complained about Slowik's conduct, and that conduct took place only when the two were alone. *See id.* at 2262.

136. The Court found the first clause of § 219(d)(2), relating to apparent authority, would not normally be applicable because "[i]n the usual case, a supervisor's harassment involves the misuse of actual power, not the false impression of its existence," which would be more appropriately analyzed under the Restatement's "aided in" agency relation [219(2)(d)] rule. *Id.* at 2268.

137. *See id.*

138. *Id.*

139. The Court explained that tangible employment action meant "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* This narrow definition appears to be a retrenchment from the old quid-pro-quo standard, which reached less severe adverse actions taken by the supervisor. *See supra* note 128 and accompanying text. Under the standard announced in *Burlington*, reassignment to a more inconvenient job would be insufficient. *See* 118 S. Ct. at 2269 (citing Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994)). In my view, a clearer standard would find vicarious liability if the supervisor took *any* adverse action by virtue of his supervisory power, regardless of the severity of such action. A supervisor cannot reassign an employee to a more inconvenient job but for the exercise of delegated employer authority. In *Faragher*, for example, the harasser, Terry, told Faragher, "'Date me or clean the toilets for a year.'" Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2280 (1998). Had this threat been acted on, it is not clear that it would constitute an "employer action" as defined in *Burlington*. Terry could not have assigned Faragher to clean toilets, or any other unpleasant assignment, however, except through use of his delegated authority. Thus, I cannot see how *any* work-related adverse action would not constitute an action "aided by" the agency relationship.

140. *See Burlington*, 118 S. Ct. at 2269.

141. *See id.*

more fully developed in *Faragher*,[142] where, in addressing the inherent assistance the agency relationship gives sexual harassment, the Court stated:

> When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose "power to supervise—[which may be] to hire and fire, and to set work schedules and pay rates—does not disappear . . . when he chooses to harass through insult and offensive gestures rather than directly with threats of firing or promises of promotion."[143]

The Court thus found that employers were vicariously liable "to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."[144] In doing so, the Court did not overturn *Meritor's* holding that employers are automatically liable for harassment by its supervisors.[145] The Court did create, however, an affirmative defense for employers which the defendant must prove by a preponderance of evidence.[146]

> When no tangible employment action is taken, a defending employer may raise an affirmative defense . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[147]

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142. There the petitioners worked as ocean lifeguards at a remote beach location. *See* 118 S. Ct. at 2280. They were verbally and physically harassed by two supervisors, including one of their immediate supervisors and the individual in charge of the location. *See id.* at 2281. One harasser, Bill Terry, served as the Chief of the Marine Safety division, had power to hire lifeguards (subject to approval by higher management), and had authority to supervise all aspects of lifeguards work and training. *See id.* at 2280. The other harasser, David Silverman, was a lieutenant who was promoted to captain during Faragher's employ. *See id.* Silverman was responsible, in part, for making lifeguards' daily assignments. *See id.* Lifeguards reported to lieutenants and captains, who in turn reported to the chief. *See id.*

143. *Id.* at 2291 (quoting Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 854 (1991)).

144. *Burlington*, 118 S. Ct. at 2270.

145. The Court specifically noted, "we are bound by our holding in *Meritor* that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment." *Id.* (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986)).

146. *See id.* (citing Fed. R. Civ. P. 8(c)).

147. *Id.* The Court noted that it was satisfying the dual purposes of using agency principles and Title VII policy of encouraging forethought by employers. *See id.*

The Court also commented on what might normally satisfy the employers obligation under this test: "While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense."[148]

In sum, employer liability for hostile environment sexual harassment is in large part determined by whether the employer took prompt and appropriate corrective action once it knew or should have known of the harassment. Such remedial action has long prevented employer liability in cases involving non-supervisory co-workers,[149] and the defense is now available for hostile environment harassment created by the employee's supervisor. Thus, the employer's response to the harassment will always have some impact on its liability, and the employer seeking to avoid or limit liability will always be under some compulsion to act.[150]

148. *Id.*

149. *See* Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2289 (1998) (noting that lower courts uniformly judge co-worker harassment by a negligence standard, under which the employer was liable if it knew or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action).

150. This discussion has focused on Title VII standards. Standards for determining liability under other relevant statutes, such as Title IX, were similarly unsettled and thus also contributed to the employer's paradox. *See e.g.*, Smith v. Metropolitan Sch. Dist. Perry Township, 128 F.3d 1014, 1034 (7th Cir. 1997) (holding that the proper standard for Title IX liability is actual knowledge and failure to take action), *cert. denied*, 118 S. Ct. 2367 (1998); Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 660 (5th Cir. 1997) (holding that the standard of liability under Title IX is actual knowledge of a substantial threat). The Supreme Court, however, in *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989, 2000 (1998), implemented a significantly stricter standard for employer liability for teacher-student harassment under Title IX than exists for co-worker harassment under Title VII. Title IX generally prohibits educational institutions receiving federal funds from discriminating on the basis of sex. The Court first distinguished the remedial schemes of Title IX and Title VII, noting that while Title VII is focused on compensating victims, Title IX is focused on protecting individuals from discriminatory practices. *See id.* at 1997. It further pointed out that Title IX's express remedies operate only on actual notice and provide for the recipient of federal funds an opportunity to come into compliance following actual notice. *See id.* at 1998. With those differences in mind, the Court concluded that liability for the implied right of action for individual damages should similarly be predicated on actual knowledge. Thus, it adopted a standard of actual knowledge and deliberate indifference. *See id.* at 2000.

The application of this standard likely will diminish the employer's paradox insofar as employee-on-student harassment because individual victims will be unlikely to prevail so long as the employer takes some action so as not to demonstrate deliberate indifference. Nonetheless, an employer who metes out different discipline for similar conduct may create yet another problem: employee actions seeking reversal of discipline because of inconsistent responses to sexual harassment.

B. *Standards for Avoiding Liability*

1. Effective Policies and Complaint Procedures

Although the lower courts have for years agreed that negligence liability for sexual harassment about which the employer knew or should have known can be avoided by taking prompt and appropriate corrective action,[151] the *Burlington* and *Faragher* cases have added a new affirmative defense, applicable to vicarious liability and potentially applicable to negligence liability based on constructive, as opposed to actual, knowledge.[152]

Under the announced defenses, an employer may avoid vicarious liability by showing, among other things, that it had an effective anti-sexual harassment policy which identified persons to whom complaints are to be made, and that the victim did not take advantage of that complaint mechanism.[153]

This defense may also curtail an employer's liability via constructive knowledge. In a case decided by the Court of Appeals for the Eleventh Circuit after its *Faragher* decision, the court specifically held that a failure to complain negated the possibility of constructive knowledge.[154] The court reasoned that having a well-enforced policy met the employer's obligation to know what was going on at its workplace because the standard for constructive knowledge requires action only for what the employer should, with reasonable diligence, have known.[155] The court similarly acknowledged, however, that an ineffective or incomplete policy would not insulate the employer and that under those circumstances, there could be harassment so pervasive that the employer will be charged with knowledge.[156]

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151. *See supra* note 112. I suggest that the lower courts are uniform in recognizing this language as representing the standard. As discussed in the next section, however, I do not suggest that there has been uniform application or results using this standard.

152. *Burlington*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-93. Constructive knowledge, however, presents problems which could be resolved by requiring complaints to be filed. Typically, courts will find constructive knowledge when the conduct is extremely pervasive. Pervasiveness sufficient to satisfy the "severe or pervasive" standard is not enough in and of itself to show constructive knowledge because employers would then have constructive knowledge of all conduct constituting a hostile environment. *See* Lockhard v. Pizza Hut, 162 F.3d 1062, 1072 (10th Cir. 1998) (finding a single incident of physically threatening conduct sufficiently severe and pervasive to create an actionable hostile work environment). If this conduct is taking place at a remote location, or is innocuous conduct, employers may have difficulty in determining whether a hostile environment exists. A complaint requirement (or at least an affirmative defense in the absence of a complaint), therefore, makes sense in this context.

153. The second part of the defense relates to how the employer responds to such complaints. Employer response issues are addressed in the next section. Although the affirmative defense is new, the propriety and effect of how employers respond has been subject to numerous interpretations.

154. Farley v. American Cast Pipe Co., 115 F.3d 1548, 1553 (11th Cir. 1997).

155. *See id.*

156. *Id.* at 1553-54.

2. Prompt and Appropriate Corrective Action

Although the central concept—that prompt and appropriate corrective action bars employer liability—is easily articulated, it is difficult to discern exactly how quickly and how harshly an employer must act in order to be deemed to have acted "promptly" and "appropriately." Again, the inquiry is highly fact-dependant, and what has been accepted as shielding an employer in one case may be deemed insufficient in a similar case.[157]

a. *Promptness*

Although courts have varied in terms of what they consider prompt corrective action, they generally have found the promptness criteria satisfied when the employer conducts an investigation within hours or days after actually learning of the harassment[158] and when corrective action follows within a reasonable period of time.[159] On the other hand, even a moderate delay in *initiating* an investigation may lead to a finding that prompt action has not occurred,[160] and lengthy delays are clearly unacceptable.[161] Promptness is measured from the time

157. *See, e.g.*, Barrett v. Omaha Nat'l Bank, 726 F.2d 424, 427 (8th Cir. 1984) (stating that the promptness and adequacy of the employer's response to correct instances of alleged sexual harassment must be evaluated upon a case-by-case basis). These cases all discuss the requirements of prompt and appropriate corrective action in the context of the plaintiff having the burden of persuasion on the issue of the non-existence of appropriate corrective action. Under the affirmative defenses created by *Faragher* and *Burlington*, the employer bears the burden of proving that it took such action. This subtle difference may not have any impact on cases where the employer took clear and decisive action. Where less decisive action is taken, however, the employer may not be able to sustain its burden. Should cases develop in this manner, this would constitute one more pressure point for the employer seeking to avoid the labyrinth of liability.

158. For a discussion of the complications resulting from requests for confidentiality or complaints made to the "wrong" supervisor, see *infra* Part III.B.2.a.

159. *See, e.g.*, Carmon v. Lubrizol Corp., 17 F.3d 791, 793 (5th Cir. 1994) (noting that an investigation started the same day); Nash v. Electrospace Sys., Inc., 9 F.3d 401, 403 (5th Cir. 1993) (noting that the investigation and remedy occurred within one week); Saxton v. AT&T, 10 F.3d 526, 535 (7th Cir. 1993) (noting that an investigation started the next day, a report was issued in two weeks, and a remedy within five weeks); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 310 (5th Cir. 1987) (noting that the one-day time lapse between the complaint and the remedy was reasonable); Ryczek v. Guest Servs., Inc., 877 F. Supp. 754, 756 (D.D.C. 1995) (noting that an investigation commenced the same day the complaint was made); Tunis v. Corning Glass Works, 747 F. Supp. 951, 958-59 (S.D.N.Y. 1990) (noting that the employer "took immediate corrective measures"), *aff'd mem.*, 930 F.2d 910 (2d Cir. 1991).

160. *See, e.g.*, Bennett v. New York City Dep't of Corrections, 705 F. Supp. 979, 988 (S.D.N.Y. 1989) (finding that a delay of four weeks was too long and, thus, denying a motion by the employer for summary judgement).

161. *See, e.g.*, Baker v. Weyerhaeuser Co., 903 F.2d 1342, 1348 (10th Cir. 1990) (holding that over six months with no action is too long).

the employer has knowledge of the hostile environment.[162] Thus, an employer with actual knowledge of such misconduct can be held liable even in the absence of a complaint if the employer fails to take corrective action.[163]

While a determination of whether the employer's corrective action was sufficiently prompt is a simple matter where there is a specific complaint of sexual harassment or other evidence of actual employer knowledge, questions remain as to when the clock begins to run in a number of situations: when complaints are made on an "unofficial" basis, that is, with a specific request that no action be taken;[164] or when they are made to a low-level supervisor or employee not designated in the company's sexual harassment policy.[165]

In the latter scenario, complaints to a non-designated supervisor or to an employee who is not high enough in the employer's hierarchy may be insufficient to give notice to the employer and, therefore, may not be relevant in measuring the promptness of the employer's action.[166] Where the supervisor ranks high enough to be considered an agent for purposes of imputing knowledge to the company, however, liability may be based on the failure to take prompt action.[167]

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162. *See* Knabe v. Boury Corp., 114 F.3d 407, 411 (3d Cir. 1997) (explaining that an employer is liable for an employee's behavior under a negligence theory of agency if "management-level employees had actual or constructive knowledge about the existence of a sexually hostile work environment and failed to take prompt and adequate remedial action" (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3d Cir. 1990)).

163. For example, in *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988), the Court of Appeals found clearly erroneous the lower court's finding that the employer had acted promptly, despite the fact that they immediately investigated and took corrective action upon receiving the plaintiff's complaint about an offensive cartoon with her name posted in the men's room. The court's decision hinged on the fact that the CEO of the company had seen the cartoon prior to the complaint and failed to act.

164. *See* Gallagher v. Delaney, 139 F.3d 338, 348 (2d Cir. 1998) (describing the confidential complainant as creating a "catch-22" situation for the employer: if the employer honors the victim's request, it "risks liability for not quickly and effectively remedying the situation").

165. *See id.* (quoting Torres v. Pasano, 116 F.3d 625, 634 (2d Cir.), *cert. denied*, 118 S. Ct. 563 (1997)).

166. For instance, in *Baskerville v. Culligan International Co.*, 50 F.3d 428 (7th Cir. 1995), the Seventh Circuit refused to consider the plaintiff's earlier complaints to the alleged harasser's supervisor, noting that those complaints were "not . . . going through proper channels," since the company's harassment policy required that complaints be made to the human resources department. *Id.* at 432. Similarly, in *Hosey v. McDonald's Corp.*, 71 Fair Empl. Prac. Cas. (BNA) 201 (D. Md. 1996), *aff'd*, 113 F.3d 1232 (4th Cir. 1997), the court discounted the teenage victim's complaints to a variety of lower level personnel whose titles included the word supervisor or manager, but who had no actual authority to discipline the alleged harasser. *See id.* at 202, 204.

167. See *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55 (2d Cir. 1998), in which the court stated:

> An official's knowledge will be imputed to an employer when: (A) the official is at a sufficiently high level in the company's management hierarchy to qualify as a proxy for the company; or (B) the official is charged with a duty

Courts, though, are not always sympathetic to employer claims that complaints were made outside of proper channels. In *Davis v. Tri-State Mack Distributors, Inc.*,[168] the Eighth Circuit rejected the company's contention that it had acted promptly following a complaint to the comptroller. Instead, the court focused on the lack of adequate action taken following the plaintiff's complaint to the branch manager—the alleged harasser's immediate supervisor.[169]

This pliable notion—that complaints to some supervisors place the company on notice for purposes of, among other things, determining promptness, while complaints to others do not—causes difficulties for both the victim and the company. Victims—particularly less sophisticated victims—may be reluctant to lodge a complaint with "top brass," with whom they have little contact. Those same victims, however, may, in many instances, be able to locate and raise the issue with a particular supervisor with whom they feel comfortable.[170] Such complaints should not be deemed meaningless.[171]

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to act on the knowledge and stop the harassment; or (C) the official is charged with a duty to inform the company of the harassment.

Id. at 64 (quoting *Torres*, 116 F.3d at 636-37).

168. 981 F.2d 340 (8th Cir. 1992).

169. *See id.* at 343-44. More recently, in *Varner v. National Super Markets, Inc.*, 94 F.3d 1209 (8th Cir. 1996), the Eighth Circuit again refused to absolve an employer of liability when a complaint was made to an individual who had "undisputed supervisory authority" but who was not officially designated in the employer's policy on sexual harassment. *Id.* at 1213. Under the policy, any supervisor receiving complaints of sexual harassment was to direct the victim to a specified individual and not take any action himself. *See id.* at 1212. The court noted that a procedure which "does not require a supervisor who has knowledge of an incident of sexual harassment to report that information to those who are in a position to take appropriate action" is flawed and will not shield the employer from liability. *Id.* at 1214.

170. In *Coates v. Sundor Brands, Inc.*, No. 97-9102, 1999 WL 12822 (11th Cir. Jan. 14, 1999), the victim initially revealed her complaint to a co-worker who was also an ordained minister. *See id.* at *1. The co-worker acted as a go-between, and presented her complaint, confidentially, to upper management. *See id.*

171. Judge Barkett, concurring in *Coates*, clearly explained the victim's dilemma and the consequences of allowing non-designated supervisors to ignore victims complaints:

> [T]he legitimately complaining employee, having received no relief, is left feeling chastened and even less inclined to press her complaint, and thus even more compromised in her ability to perform unimpeded the tasks and responsibilities for which she was hired. Just as it is difficult for an employee to protect herself from harassment by a supervisor because of the power he wields over her in the employment hierarchy, so too is it difficult for an employee—who may have been extremely reluctant to confide in a manager in the first place—to demand that a supervisor provide a prompt and effective response to her complaint.

Id. at *8 (Barkett, J., concurring). He further noted:

> A supervisor's failure to act when that supervisor has knowledge of the harassment and the authority to prevent it inflicts harm on the victim that is as real as if the supervisor were doing the harassing. The victimized employee in this situation thus suffers two distinct, discriminatory harms: the co-worker's initial harassment; and the supervisor's implicit approval of the harassment, which changes and intensifies the quality of the injury.

More importantly, there is no reason to treat violations of the company's sexual harassment policy differently than violation of other work rules. Simply put, *all* supervisors should have the same responsibility vis-à-vis sexual harassment as they have regarding other types of misconduct. A supervisor, at any level, who observed or received complaints about theft or destruction of company property, fighting, drug use on company premises, or falsification of time cards without taking action or reporting it to the proper authority would be considered remiss. Similarly, supervisors should not simply ignore incidents of sexual harassment that they observe or about which they receive complaints. They should, instead, be officially charged with the responsibility of reporting all such incidents to the appropriate person.

A completely different problem exists, however, when a complaint is "unofficially" lodged with an appropriate person, since the employer clearly has actual knowledge at that point. Logically, an employer who fails to take appropriate corrective action in response to such a complaint does so at its own risk. The employer's duty to correct a hostile environment arises when it knows of the existence of that environment, and the existence or non-existence of its legal responsibility to comply with anti-discrimination laws does not rest with its employees' preferences. Nonetheless, employers routinely honor employees' requests that no action be taken.[172]

While an employee who makes such a request would likely be precluded under an estoppel theory from receiving damages for sexual harassment during the interceding time period, that individual's request for confidentiality logically has no impact on a claim by any other person affected by the hostile environment. A different person later victimized by the same harasser would be free to argue that the employer knew of the earlier harassment, took no action, and, thus, should be liable for the subsequent illegal conduct committed by the same individual.[173] Furthermore, action taken in response to the subsequent victim's complaints, no matter how quickly taken, should not

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Id.

172. For example, in *Karibian v. Columbia University*, 14 F.3d 773, 776 (2d Cir. 1994), the plaintiff initially complained in 1988 to the University's Panel on Sexual Harassment. At that time, she met with a panel member and also with the University's Equal Opportunity Coordinator. *See id.* At Karibian's request, however, both meetings were confidential and the University took no action. *See id.* Indeed, it was not until almost two years later, when Karibian dropped her confidentiality request, that Columbia acted. *See id.* Notwithstanding the confidentiality request, however, under these facts Columbia would be hard-pressed to argue that it was without notice of the harassment in 1988, or that it acted promptly upon receiving such notice.

173. In *Al-Dabbagh v. Greenpeace, Inc.*, 873 F. Supp. 1105 (N.D. Ill. 1994), the court refused to dismiss the plaintiff's claim, holding that the company could be held liable for the sexual assault on the plaintiff based on its earlier failure to take corrective action against a known "womanizer." *Id.* at 1108. In that instance, the employee sexually assaulted the plaintiff on the first day he met her. *See id.* Although the plaintiff obviously had not complained, the company's failure to act on earlier complaints from other victims was used as the basis for liability. *See id.* at 1111. In short, its

be considered prompt. An employer is required to act promptly to correct a sexually offensive environment whenever it has actual knowledge of the environment, even in the absence of an "official" complaint.[174]

As demonstrated above, promptness is a pliable concept even where there is direct evidence that the employer had actual notice of the harassment. The ambiguities are even greater in cases when the employer is charged with constructive notice because an official representing the employer "upon reasonably diligent inquiry should have known" of the harassing environment.[175] Constructive knowledge is judged by the pervasiveness, severity, and openness of the harassment.[176] Openness is important because no matter how severe or pervasive the conduct is, it cannot be the basis for constructive knowledge if it is secretive. Similarly, the more severe the conduct, the more likely a management level supervisor observing it or hearing about it would (and should) recognize it as hostile environment harassment mandating employer action. Thus, conduct that is observed or heard on only a few occasions would have to be more severe, and more innocuous conduct would have to be more pervasive, to demonstrate constructive knowledge and generate a duty to take corrective action absent a complaint. Where the conduct is pervasive enough to support a finding of constructive knowledge, any corrective action taken by the employer should not be deemed "prompt," because the pervasiveness of the conduct means that it must have been longstanding.[177]

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previous failure to act rendered any later corrective action untimely. Thus, the employer's response to Al-Dabbagh's complaint did not shield it from liability.

174. *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987), is on point here. In that case, one of several women harassed in 1980 complained to a mid-level manager "as a friend," but out of fear for her job she did not want to make a formal complaint to the Director of Personnel or the Director of EEO Compliance. *Id.* at 635. Two years later, two additional employees harassed by the same individual did make formal complaints, which resulted in an investigation and ultimately the demotion of the harasser. *See id.* at 633. In finding the company liable despite its quick action, the court concluded that even though it would be difficult to say unequivocally that the company had notice of the earlier harassment, the factual finding that it knew or upon reasonable diligence should have known of the harassment was not clearly erroneous. *See id.* at 636. In light of its earlier knowledge, the court reasoned that, "although Avco took remedial action once the plaintiffs registered complaints, its duty to remedy the problem, or at a minimum, inquire, was created earlier when the initial allegations of harassment were reported." *Id.* at 636; *see also* Bennett v. Corroon & Black Corp., 845 F.2d 104, 106 (5th Cir. 1988) (finding notice where the employer "saw . . . offensive cartoons and allowed them to remain where they were" for a week even though the employee did not formally complain).

175. Farley v. American Cast Iron Pipe Co., 115 F.3d 1548, 1553-54 (11th Cir. 1997) (emphasis omitted).

176. *See id.* at 1553 (rejecting alleged constructive knowledge because, among other things, the alleged harassment was not common knowledge and there was no first-hand corroboration of the harassment).

177. *See* Wallace v. Dunn Constr. Co., 59 Fair Empl. Prac. Cas. (BNA) 994, 996 (N.D. Ala. 1991) (discussing the relationship between promptness, pervasiveness, and

In sum, an employer can be assured that it will escape liability only if it takes appropriate corrective action within hours of discovering severely harassing conduct or within days of discovering subtly harassing or questionable conduct. It can be assured of having corrective action deemed prompt absent a complaint only if it acts with similar haste after observing severe, overtly sexual conduct and if it affirmatively investigates after observing more innocuous conduct to ensure that it is not creating a hostile environment.

b. *Appropriateness*

Ascertaining whether the employer's corrective action is "appropriate" is even more problematic than determining whether the action is "prompt." The most widely accepted standard for making this determination requires that the employer's action must be "reasonably calculated to end the harassment."[178]

The problem with the "reasonably calculated" standard is that it is difficult for an employer seeking to avoid liability to determine what level of action will later be deemed to have been sufficiently reasonable to end the harassment. As with other aspects of sexual harassment law, the outside parameters are clear but there is a substantial gray area in between. At one end of the spectrum, employers who take no action will be held liable,[179] even if the harassment stops.[180]

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the inference of constructive knowledge), *aff'd in part, rev'd in part*, 62 F.3d 374 (11th Cir. 1995).

178. Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983); *see* Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991); Waltman v. International Paper Co., 875 F.2d 468, 478-79 (5th Cir. 1989). This standard, however, is not universal. Some courts have held that the appropriate inquiry is what a reasonable employer would have done to remedy the sexual harassment. *See* Brooms v. Regal Tube Co., 881 F.2d 412, 421 (7th Cir. 1989).

179. A surprising number of employers take no action, even in the face of a direct, unqualified complaint. For example, complainants have been told to "get used to it," "not make a stink about it," and "ignore it" in response to direct, unqualified complaints. *See, e.g.*, Hope A. Comisky, *"Prompt and Effective Remedial Action?" What Must an Employer Do to Avoid Liability for "Hostile Work Environment" Sexual Harassment?*, 8 Lab. Law. 181, 185-86 (1992) (citing Evans v. Ford Motor Co., 768 F. Supp. 1318, 1326 (D. Minn. 1991); Wall v. AT&T Techs., Inc., 754 F. Supp. 1084, 1088 (M.D. N.C. 1990); Danna v. New York Tel. Co., 752 F. Supp. 594, 609 (S.D.N.Y. 1990)). In some instances the response is dismissive. In *Varner v. National Super Markets, Inc.*, 94 F.3d 1209 (8th Cir. 1996), the plaintiff was told in response to her complaint that "That's just Bob being himself." *Id.* at 1211 (internal quotations omitted). One of the most baffling responses was that of the human resources manager in *Cortes v. Maxus Exploration Co*, 977 F.2d 195 (5th Cir. 1992). After being told of the harassing conduct, he instructed the complainant to close her eyes and imagine pink elephants in a parade holding onto each other's tails with their trunks. *See id.* at 198. He then snapped his fingers in front of her closed eyes and instructed her to forget the pink elephants. *See id.* He advised her to respond in the same way to the harassment—to just put it out of her mind. *See id.* From that point on, whenever she again complained, he snapped his fingers to remind her of his proposed way of handling the harassment. *See id.*

180. Courts have recognized that the employer's duty to take some action arises once it has knowledge of a complaint, regardless of whether the harassment contin-

At the other end, employers who guarantee that the harassment will not recur by immediately discharging the harasser will undoubtedly avoid liability.[181] However, what type of remedial action short of discharging the harasser will be considered "appropriate" for the purpose of limiting Title VII liability is unclear.[182]

In determining whether the employer's action was reasonably calculated to end the harassment, courts generally consider the severity and pervasiveness of the harassment; whether the harshness of the employer's action is reasonable in light of the level of severity or perva-

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ues. For example, in *Fuller v. City of Oakland*, 47 F.3d 1522, 1525-28 (9th Cir. 1995), the victim was subjected to harassing conduct for a number of months by a co-worker who had previously been her boyfriend. After concluding that the conduct, which was severe and pervasive enough to be actionable, had ceased *before* the employer had knowledge, the Ninth Circuit nonetheless imposed liability on the employer, which had conducted a half-hearted investigation and found the complaints unfounded. *See id.* at 1528-29. While noting that the corrective action must be reasonably calculated to end the harassment, the court reasoned that determining whether the harassment has stopped is merely a "test for measuring the efficacy of a remedy" and does not excuse the employer's obligation to take some action. *Id.* at 1528 (emphasis omitted). According to the court, once an employer learns of the harassing conduct—present *or past*—"a remedial obligation kicks in" and the only question is whether the employer is relieved of liability for the harasser's actions because it took sufficient disciplinary and remedial action in response to the complaints. *Id.*

181. *See, e.g.*, Kauffman v. Allied Signal, Inc., 970 F.2d 178, 185 (6th Cir. 1992) (refusing to impose liability based on the employer's immediate discharge of the alleged harasser). While taking this drastic action will certainly avoid liability for sexual harassment, such summary discharge is more likely to trigger an "angry male" action. *See infra* Part IV. Further, courts do not generally require discharge of the alleged harasser. *See* Ellison v. Brady, 924 F.2d 872, 881-82 (9th Cir. 1991) (citing Barrett v. Omaha Nat'l Bank, 726 F.2d 424, 427 (8th Cir. 1984)). However, because discharge is occasionally the only appropriate remedy, such as when the harassment is particularly severe or threatening, it is properly identified as the outer limit of "appropriate" corrective action.

182. It is not completely clear whether the action must be disciplinary. Nevertheless, in *Intlekofer v. Turnage*, 973 F.2d 773 (9th Cir. 1992), Judge Hall clearly believed that disciplinary action was needed, writing, "[w]e interpret the phrase 'appropriate corrective action' to require some form, however mild, of disciplinary measures." *Id.* at 778 (quoting 29 C.F.R. § 1604.11(d) (1998)); *see also Ellison*, 924 F.2d at 882 ("Employers send the wrong message to potential harassers when they do not discipline employees for sexual harassment."). Not all courts, however, require that the action be disciplinary. Some courts have refused to impose liability when the harassment, though severe and pervasive enough to be actionable, was not egregious, and in fact stopped due to some non-disciplinary action promptly taken by the employer. *See, e.g.*, Knabe v. Boury Corp., 114 F.3d 407, 414-15 (3d Cir. 1997) (ruling that a non-disciplinary conversation with harasser was sufficient because it was reasonably calculated to stop the harassment, regardless of its actual effects). In fact, in his concurring opinion in *Intlekofer*, Judge Keep argued that because Title VII is remedial, not punitive, the employer's obligation is met so long as it effectively ends the harassment. *See Intlekofer*, 973 F.2d at 783 ("[A] 'mere request to stop' unlawful conduct may be sufficient to alter the unlawful behavior of some harassers, and therefore sufficient to discharge the employer's duty under Title VII.").

siveness of the harassment.[183] In a somewhat contradictory fashion, they also consider the action's *actual* effectiveness in eliminating the hostile environment.[184] Thus, when some action has been promptly taken *and* the harassment stops, liability usually is not imposed.[185]

Employer action at either extreme thus yields predictable results. Discharge, demotion or removal of supervisory authority is usually enough to shield the employer from liability even in cases of outrageous conduct.[186] Sham investigations followed by a slap on the wrist or no action whatsoever will generally lead to a finding of liability.[187] Some employers, however, whose reasonable investigations reveal that the harassment likely took place, take only moderate corrective steps—because the instances of the harassment were not fully corroborated or not viewed as severe enough to warrant greater action, or the employer did not follow progressive discipline[188] or want to lose a top manager. Such employers are simply gambling that the harassment will not be repeated or that their actions will be considered to have been "reasonably calculated" to end the harassment, even though unsuccessful.

183. The discipline should be "assessed proportionally to the seriousness of the offense." *Ellison*, 924 F.2d at 882 (quoting Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309 (5th Cir. 1987)).

184. In *Ellison*, the Ninth Circuit summed up the standard by referring to its actual effectiveness: "In essence, then, we think that the reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment." *Id.* The standard has backward-looking overtones because actual effectiveness is a key component in assessing reasonableness.

185. *See, e.g.*, Baskerville v. Culligan Int'l Co., 50 F.3d 428, 432 (7th Cir. 1995) (finding no liability where the harasser was told to stop, was put on probation, and had a promotion temporarily withheld, and the harassment stopped); Saxton v. AT&T, 10 F.3d 526, 537 (7th Cir. 1993) (finding no liability because the harasser was transferred, and thus could no longer harass the victim, despite the victim's dissatisfaction with the remedy); *Dornhecker*, 828 F.2d at 309 (noting that the victim quit before it could be determined if the employer's proposed remedy would have stopped the harassment); Swentek v. USAir, Inc., 830 F.2d 552, 558-59 (4th Cir. 1987) (stating specifically that the fact that there was no further harassment was significant).

186. *See, e.g.*, Guess v. Bethlehem Steel Corp., 913 F.2d 463, 464 (7th Cir. 1990) (finding no liability where the employer reprimanded and denied promotion to the alleged harasser); *Barrett*, 726 F.2d 424, 427 (ruling that placing an offender on probation with a warning that further misconduct will result in termination was adequate).

187. *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995), is illustrative of some of the factors that influence a court to look behind an investigation and deem it a sham. The investigator did not interview the alleged harasser until the plaintiff had filed an EEOC complaint. *See id.* at 1526. Further, the investigator flatly accepted the alleged harasser's version of events whenever they conflicted with the victim's account. *See id.* at 1529. In addition, the investigator failed to interview other witnesses and failed to check the alleged harasser's telephone records for the period when the victim had received numerous harassing hang-up phone calls. *See id.* at 1526, 1529.

188. Progressive discipline is the principle that unless the offense truly warrants severe action, the goal should be correction rather than strict penalization. It is often the basis for a reduction in discipline, particularly when the employee was discharged. *See* Frank Elkouri & Edna A. Elkouri, How Arbitration Works 916-17 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997).

Moreover, while courts will determine whether the harassment has in fact stopped, that fact alone may not be sufficient to protect an employer from liability. At least one court has held that the employer is obligated to take some action, even though the actionable harassment ceased before the employer became aware of it.[189]

Given the wide variations in the standards defining "sexual harassment" and "prompt and appropriate" corrective action, it appears that employers seeking to avoid liability for sexual harassment are under pressure to take severe disciplinary action against a suspected harasser within days of learning of even questionable misconduct. If the employer or its supervisors misjudge whether certain conduct is legally sexual harassment—and thus fail to take corrective action—the employer could be liable for that conduct. The uncertainties surrounding the "promptness" requirement may similarly force the employer to act within hours or days instead of weeks or months. In some instances an employer may feel pressured to render a decision without a thorough investigation. Further, because a quick investigation with a finding of no harassment may lead to the imposition of liability on the basis that the investigation was a sham,[190] the employer may have an incentive to conduct a quick investigation and take some action, even if the investigation is inconclusive. Thus, even when the investigation does not substantiate the complaint of harassment, the employer feels pressure to take some action, such as issuing an oral admonishment, counseling the alleged harasser, or making some notation in his personnel file.[191]

Finally, the employer may be pressured to mete out stiff discipline in lieu of other corrective actions. Although the determination of the action's appropriateness turns on whether it is reasonably calculated to end the harassment, courts evaluated this requirement from a backward-looking point of view, evaluating the actual effect of the action, not its reasonably foreseeable effect. Moreover, while courts have held that discharge of the harasser is not required,[192] the employer that fails to do so risks liability for further harassment because it is then on notice as to the employee's propensity.[193]

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189. *See Fuller*, 47 F.3d at 1528-29.

190. *See* Yates v. Avco Corp., 819 F.2d 630, 635-37 (6th Cir. 1987).

191. *See* Ryczek v. Guest Servs., Inc., 877 F. Supp. 754, 756-60 (D.D.C. 1995).

192. Generally, courts adhere to the standard that the remedy must be "reasonably calculated to prevent further harassment." Juarez v. Ameritech Mobile Comm., Inc., 746 F. Supp. 798, 804 (N.D. Ill. 1990), *aff'd*, 957 F.2d 317 (7th Cir. 1992). Removing the offensive materials, *see* Tumis v. Corning Glass Works, 747 F. Supp. 951 (S.D.N.Y. 1990), *aff'd*, 930 F.2d 910 (2d Cir. 1991), written warnings, *see* Swentek v. USAir, Inc. 830 F.2d 552, 554 (4th Cir. 1987), and suspensions have all been found adequate, *see Juarez*, 746 F. Supp. at 805.

193. The employer may also be subjected to liability in a negligent retention suit. *See, e.g.*, Hartsell v. Duplex Prods., Inc., 123 F.3d 766, 744 (4th Cir. 1997) (finding no negligent retention claim where employee did not commit a tort or Title VII violation); *see also* Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994)

The meting out of swift, stiff discipline, however—sometimes skipping intermediate progressive steps or based on uncorroborated evidence—leads employers into the next level of the labyrinth, countersuits by "angry men." The forms of these suits vary, depending largely on whether there is a collective bargaining agreement or other basis for asserting that the discharge or discipline must be based on "just cause"[194] and on whether the employer is a public agency subject to due process requirements. Employees have the greatest success in overturning discipline when there is a collective bargaining agreement in place.[195] Moreover, while many of the challenges may ultimately be unsuccessful, the employer can incur substantial legal expenses merely attempting to comply with Title VII.

The next section of this Article examines angry male countersuits brought by employees who have direct appeal rights and who enjoy the protections of a contractual requirement of just cause. Finally, some solutions are posited.

IV. ANGRY MALE ACTIONS BASED ON DIRECT APPEAL RIGHTS LINKED TO JUST CAUSE REQUIREMENTS

A. *Introduction*[196]

Analysis of arbitrations involving discipline for sexual harassment reveals that just cause principles applied by arbitrators frequently con-

(ruling that the employer's failure to discharge the offender earlier established liability).

194. *See infra* notes 197-204 and accompanying text.

195. *See infra* notes 200-05 and accompanying text; *infra* Table 1.

196. Any analysis of direct challenges to discipline imposed to correct a sexually hostile environment must begin by acknowledging that it is impossible to determine the total number of such challenges, much less their outcome. While the results of many such challenges are described in reported arbitration opinions, not all opinions are reported; indeed not all arbitral awards are accompanied by opinions. The arbitrator's award is that portion of the decision which formally announces the result; it is the functional equivalent of a judgment. *See* Elkouri & Elkouri, *supra* note 188, at 383-84. The opinion, like a judicial opinion, explains the rationale behind the award. *See id.* at 384-86. Even for those which are reported, there is no uniform reporting system. Some of the numerous sources of reported arbitration opinions are Labor Arbitration (Bureau of National Affairs) (LA (BNA)), Labor Arbitration Information System (LAIS), American Arbitration Awards (AAA), Arbit, Industrial Labor Relations Report and Commerce Clearing House Labor Arbitration Reporter (Arb.). Further, there is overlap among some of the various services, making a single compilation of all reported decisions difficult, if not impossible. Moreover, arbitrators' decisions to reverse or reduce disciplinary sanctions imposed by employers account for only a portion of the reversals and reductions that take place in the collective bargaining grievance process.

It is impossible to tell how many disciplinary actions in the sexual harassment context are reversed or reduced when a grievance is settled in the early stages of the process, but such cases certainly exist. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), for example, arose from just such a scenario. In that case, the alleged harasser, Gray, wrote several ominous letters to the victim, Ellison. *See id.* at 874. When Ellison complained to her and Gray's supervisor, Gray was transferred to another facility. *See*

flict with standards used by courts in assessing employer liability for sexual harassment committed by employees. Simply put, arbitrators reviewing discipline and courts determining sexual harassment liability generally review the same evidence with different rules and from different perspectives. Thus, they often reach opposite conclusions.

For the purpose of this Article, I chose to limit my focus to arbitrations and compiled a data base from a variety of sources reporting arbitrations. My analysis revealed a number of trends in terms of the frequency and rationale that arbitrators use in applying general just cause principles to discipline for sexual harassment. A brief exposition of just cause principles precedes this analysis.

B. *General Principles of Just Cause*

An arbitrator's authority to hear and decide disputes derives from a contractual agreement between the parties. Therefore, the touchstone of arbitration is the contract granting the arbitrator authority to act. In the labor-employment context, any agreement to submit certain claims to arbitration is usually included in the employment contract, whether individually negotiated or collectively bargained.[197]

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id. Three weeks after his transfer, however, Gray filed a grievance seeking to return. *See id.* The grievance was settled, and Gray was allowed to return to the same facility where Ellison worked, with the transfer being reduced from being a permanent change to a six-month cooling-off period. *See id.* This settlement, like many others, is simply not reported. It would have remained private and unascertainable had Ellison not decided to sue once she leaned that Gray was returning. In another case, *Ohiocubco, Inc.*, Lab. Arb. Awards (CCH) ¶ 8394, at 4994 (May 25, 1988), the employer initially warned the grievant and moved him to another shift, whereupon he grieved and was returned in settlement. *See id.* at 4997. The employer's later attempt to move him again, in response to the victim's complaints about his return was disallowed by the arbitrator. *See id.* at 4998-99. Again, absent further action by the employer, information regarding his initial settlement would not have been reported.

A grievance procedure usually has several steps, ranging from an informal complaint to arbitration. The number of steps and the time frame and complexity of the process vary a great deal, particularly between small and large companies. Many procedures include an initial appeal to the supervisor who imposed the discipline. Typically, the grievance must be initiated within a specified time period. *See* Elkouri & Elkouri, *supra* note 188, at 232-33.

197. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court held that binding arbitration of age discrimination cases was permissible where there was an individual waiver of judicial remedies. In addition, the Court vacated and remanded *Dean Witter Reynolds, Inc. v. Alford*, 500 U.S. 930 (1991), a Title VII case with the same issue, with instructions that the Fifth Circuit reconsider in light of *Gilmer*. The Fifth Circuit did so and reversed its position finding that Title VII claims were subject to mandatory arbitration agreements. *See* Alford v. Dean Witter Reynolds Inc., 939 F.2d 229, 230 (5th Cir. 1991). Most circuit courts have now held that individual agreements to arbitrate Title VII claims are binding. *See* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc., 163 F.3d 53, 60 (1st Cir. 1998); Benefits Communication Corp. v. Klieforth, 642 A.2d 1299, 1304-05 (D.C. App. 1994); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 699-700 (11th Cir. 1992). The Supreme Court has recently revisited the issue, first raised in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 (1974), of whether a collectively bargained waiver is binding. *See* Wright v. Universal Maritime Serv. Corp., 119 S. Ct. 391, 395-96 (1998) (holding that

Under the common law doctrine of employment-at-will, employers need not justify adverse employment actions taken against employees. In general, employers may act for a sound business reason, an unsound business reason, an arbitrary reason, or even a hostile reason, so long as they do not violate statutory employment law in the process.[198] Further, with at-will employment, employees cannot directly challenge the propriety of the employer's action.[199] There are, however, several non-statutory sources that, in essence, insert a "just cause" requirement into the employer-employee relationship.[200] The just cause provision prevents management from acting in an arbitrary manner and requires that certain prerequisites be met before discipline is imposed. Such a provision curtails an employer's right to act without justification and simultaneously provides an employee with a right to directly appeal such an action on the grounds that it was not justified.

First and foremost, the employer can *agree* to limit disciplinary action to cases where just cause can be established and to provide the employee with specific channels and procedures to challenge employer decisions, including disciplinary actions. While such agreements are sometimes made as part of an individual employment contract,[201] they occur most commonly in the context of collective

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there was no waiver of the employee's rights under the Americans with Disabilities Act because the terms of the waiver were general and broad and declining to answer the question of whether a specific waiver of such rights would ever be valid). The discord in this area, however, has no effect on whether an employer's discipline of alleged sexual harassers may be arbitrated, because the authority to arbitrate such cases does not depend on the authority to arbitrate Title VII cases. *Id.* at 394 (distinguishing between what was needed to mandate arbitration of substantive Title VII claims and other contract-based arbitration).

198. *See* Elkouri & Elkouri, *supra* note 188, at 884-85. Thus, an employer may discharge an employee out of personal animosity, even if the individual was a superb performer. On the other hand, the employer may not discharge an employee on any of the bases prohibited by Title VII or by other federal, state, or local antidiscrimination laws.

199. Even those employees without direct appeal rights have not been stopped from collaterally challenging employer actions, with occasional success. *See supra* notes 17-21 and accompanying text. While there is some uniformity in the subset of these cases decided on the basis of other employment statutes, such as those involving a challenge that persons of color are disciplined more harshly for harassment than are white males, the remaining cases—based on state common law—are very individual in nature and beyond the scope of this Article.

200. I use the term "just cause" throughout this Article to cover the various renditions of the term found in collective bargaining agreements, such as "cause," "proper cause," and "justifiable cause." All of these terms have the same meaning and serve the same purpose—to prevent arbitrary discipline and discharge. *See* Elkouri & Elkouri, *supra* note 188, at 889.

201. Even when they are not, employees sometimes seek to have such a clause implied from employee handbooks. *See* William J. Holloway & Michael J. Leech, Employment Termination: Rights and Remedies 33-45 (1993). In fact, by 1989, more than 45 states had accepted theories that eroded the "at-will" doctrine, including theories relying on implied contracts. *See* Finegan, *supra* note 14, at 66.

bargaining. Further, additional general limitations on the employer's right to act exist when the individual is a public employee. While federal and state government employees may, of course, be members of collective bargaining units with all the concomitant rights, these employees also enjoy direct appeal rights based on constitutional due process concepts.[202] Finally, although it is explicit in the overwhelming majority of collective bargaining agreements,[203] the principle of just cause is so well established that it is sometimes implied in the absence of a contractual provision disavowing it.[204]

The particular contract may define just cause, or it may rely on the definition of the term that has evolved through numerous arbitrations. The latter formulation is most frequently summarized as having the seven elements enumerated by Arbitrator Daugherty in *Enterprise Wire Company*:[205]

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202. *See* Holloway & Leech, *supra* note 201, at 482-90 (explaining how the Fourteenth Amendment confers due process rights in public employees). In addition to constitutional due process rights, many public-sector employees also have statutory rights providing for direct appeals in various forums. For example, certain federal employees have direct appeal rights to the Merit Systems Protection Board. State employees frequently have equivalent rights using a wide variety of forums and procedures. *See, e.g.*, Bexar County v. Davis, 802 S.W.2d 659 (Tex. 1990) (holding that there is no governmental requirement to notify the employee of the witnesses accusing him). These state and federal appeal rights certainly can lead into the labyrinth; consider the decade long saga of the unsuccessful attempt to fire Phillip Hillen for sexual harassment. *See* Hillen v. Department of the Army, 72 M.S.P.R. 369, 370 (1996). The initial attempt to remove Hillen from federal service occurred in 1985. *See id.* In 1997, the case was finally put to rest, with Hillen receiving a 90-day suspension. *See* King, Director, Office of Personnel Management v. Hillen, 108 F.3d 1391 (Fed. Cir. 1997). Because the appeal right varies so widely under federal and state law, however, the differences are not analyzed in this Article.

203. Ninety-four percent of all collective bargaining agreements contain just cause or equivalent clauses. *See* Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 Duke L.J. 594, 594 n.1.

204. While not all arbitrators will imply just cause when it is not bargained for, many will, reasoning that an employer's ability to arbitrarily terminate employees would render seniority protections meaningless. *See, e.g.*, Herlitz, Inc., 89 Lab. Arb. (BNA) 436, 441 (1987) (Allen, Arb.) (holding that just cause limitation on discharges is implied in labor agreements).

205. 46 Lab. Arb. (BNA) 359 (1966) (Daugherty, Arb.). Although this formulation of just cause has been called the "most widely accepted and applied standard," Anchorage Hilton Hotel, 102 Lab. Arb. (BNA) 55, 58 (1993) (Landau, Arb.), other definitions exist. For instance, in *Armstrong Industries, Inc.*, 78 Lab. Arb. (BNA) 227 (1982) (Morgan, Arb.), Arbitrator Morgan noted that the specific attributes of just cause cannot be stated categorically but must be determined on the facts of each case. *See id.* at 228. In the context of that arbitration—which involved a challenge to a discharge—Morgan described just cause as consisting of three steps: first, determining whether the offense charged was serious enough to warrant discharge; if so, then determining whether the employee actually committed the offense charged; and finally, examining mitigating or extenuating circumstances that might call for a reduction in penalty. *See id.* at 228-29. A two-step inquiry has also been endorsed. *See* Fairweather's Practice and Procedure in Labor Arbitration 327 (Ray J. Schoonhoven ed., BNA 3d ed. 1991) (inquiring whether cause for discipline existed under the facts as presented and whether the discipline imposed was appropriate).

> (1) Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct? . . . .
> (2) Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee? . . . .
> (3) Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management? . . . .
> (4) Was the company's investigation conducted fairly and objectively? . . . .
> (5) At the investigation, did the [factfinder] obtain substantial evidence or proof that the employee was guilty as charged? . . . .
> (6) Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees? . . . .
> (7) Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?[206]

Arbitrator Daugherty also announced a strict standard for applying the test: failure to comply with even one factor would preclude a finding of just cause.[207]

When assessing the appropriateness of a particular penalty, the closely related principle of "progressive discipline" is frequently imputed. This principle provides that lesser penalties should be used in an attempt to correct a problem before more serious penalties are used.[208] For example, penalties imposed under a progressive discipline approach might follow a path, from lightest discipline to harshest, such as:

> counseling→oral admonishment→written admonishment→written reprimand→short-term suspension→long-term suspension→discharge.[209]

Under progressive discipline systems, discharge is viewed as a penalty of last resort, and usually will not be imposed unless lesser measures have failed to improve the employee's overall conduct.[210] Under most progressive discipline systems, however, it is not necessary that each step be applied to every employee, regardless of the offense, and in

206. *See Enterprise Wire Co.*, 46 Lab. Arb. (BNA) at 363-64.
207. *Id.* at 362.
208. *See* Elkouri & Elkouri, *supra* note 188, at 916.
209. *See id.*
210. The employee's overall conduct is considered because discipline for different types of misconduct may be considered simultaneously. The employee's overall disciplinary record may be considered, regardless of whether all the discipline was imposed for similar violations. Elkouri & Elkouri, *supra* note 188, at 925-929; *see also infra* Part IV.C.2 (analyzing a number of arbitration cases and providing examples of specific arbitrations which reduced penalties).

certain limited instances a summary discharge will be permitted even if the employee otherwise has a clean record.[211] Indeed, some offenses, such as striking a supervisor, are universally accepted as appropriate grounds for summary dismissal, even under a progressive discipline scheme.[212]

C. *Application to Discipline for Sexual Harassment*

At first blush, it appears that an employer should be able to comply with its duty under Title VII to eliminate a hostile environment—by imposing discipline "reasonably calculated to end the harassment"[213]—without violating the principles of just cause and progressive discipline. Each of these principles is aimed at ensuring that a disciplined employee stops the offensive conduct or does not repeat it, and they do not appear so overtly contradictory that compliance with one would necessarily undermine the other. Nevertheless, the cases clearly illustrate that arbitrators do modify the penalties imposed by employers in responding to sexual harassment,[214] even in egregious circumstances, thus undermining the goals of Title VII and the attempts to create and implement a workable doctrine. It is necesssary, therefore, to determine the degree to which such penalties are modified, as well as to examine the circumstances that lead to such modification.

1. Compiling the Data

In order to determine whether changes in the current system were needed or even desirable, I first attempted to determine the frequency with which arbitrators modify the discipline imposed by employers in response to sexual harassment and what influenced their decisions. To accomplish this, I constructed a database of arbitration opinions concerning the discipline of alleged sexual harassers.[215]

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211. *See, e.g.*, Santa Catalina Island Co., No. 92-3-160, 1993 WL 787981, at *2-3 (Feb. 16, 1993) (Winograd, Arb.) (holding a four-month [full-season] suspension appropriate because the grievant did not respond to counseling); Boeing Commercial Airplane Group, 93-1 Arb. ¶ 4051 (1993) (Cantor, Arb.) (finding a discharge without progressive discipline proper in light of the severity of the conduct); Social Sec. Admin., 81 Lab. Arb. (BNA) 459, 460-61 (1983) (Cox, Arb.) (requiring no lock step progressive discipline and noting that discipline is not only to correct but may also fit the crime).

212. *See, e.g.*, Chrysler Motors Corp. v. International Union, Allied Indus. Workers, 959 F.2d 685, 688 (7th Cir. 1992) (stating that extremely serious offenses, such as striking a supervisor, are grounds for a summary discharge).

213. *See supra* Part III.B.2.b.

214. *See, e.g.*, *Chrysler Motors Corp.*, 959 F.2d at 689 (declining to reverse an arbitrator's decision to reinstate an employee who "grabbed" a co-worker's breasts because the arbitrator determined that discipline short of discharge would be a sufficient deterrent).

215. As previously noted, review of arbitration decisions is difficult because of the lack of a uniform reporting requirement or system. The sources for reported arbitrations vary widely, with some sources containing a wide variety of decisions, and others

While the vast number of arbitrations located involved the discipline of the employee for sexual harassment, arbitrations involving somewhat related topics were also retrieved. These included victim claims,[216] discipline for consensual sexual behavior on the work premises,[217] and discipline for supervisor malfeasance.[218] In my study, victim claims and claims by consensual actors were not included because they do not directly contribute to the dilemma[219]—the conundrum of taking action to remedy an environment of sexual harassment, and the susceptibility of retaliation from the "angry man."

In addition, some arbitrations—particularly older ones—did not refer to "sexual harassment" but involved conduct which would possibly be considered harassment under Title VII standards.[220] These arbitrations were usually based on violations of work rules against immoral conduct or obscene language.[221] They were included if they were de-

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being very limited. Because the idiosyncracies of limited reporting systems might have distorted the analysis, I decided not to use them to search for arbitrations. Therefore, I compiled data only from four major general sources of arbitration opinions: the Bureau of National Affairs Labor Arbitration Reporter; the Commerce Clearing House Labor Arbitration Reporter; the Labor Arbitration Information System; and the Westlaw database of "unreported" decisions. Even within these sources, there was significant overlap—the same arbitration might be reported in two or even three of these sources, as well as appearing in other sources. Subsequent to the compilation of the database, all duplicates were eliminated.

216. This occurs when a victim of sexual harassment files a grievance because of some adverse employment decision and alleges that the sexual harassment in some way impacted the decision.

217. See, for example, *Vermont, Department of Corrections*, 102 Lab. Arb. (BNA) 701 (1994) (McHugh, Arb.), where the arbitrator upheld discipline for engaging in sexual misconduct with a female employee while on duty. *See id.* at 708-09. Such cases, of course, do not meet the legal definition of sexual harassment since voluntary, non-coerced actions are not "unwelcome." The concept that an employer can prohibit consensual workplace conduct which is not legal sexual harassment, however, is important for the system outlined in the next part.

218. These include arbitrations where a supervisor who did not participate in the alleged harassment had been disciplined on the bases of not reporting, investigating, or eliminating sexual harassment.

219. Some arbitrations, however, defy easy classification. For example, in *General Dynamics, Ft. Worth Division*, 100 Lab. Arb. (BNA) 180 (1992) (Francis, Arb.), the company charged the victim with sexual harassment based on her sending a letter detailing the harasser's actions toward her to the harasser's wife. *See id.* at 181. While victim actions were generally excluded, this particular one was included because the company classified the action as sexual harassment. Supervisor malfeasance was included because the failure of the supervisor to act (and discipline based on this) impacts on the employer's liability, thus contributing to the dilemma. *See id.* at 186-88.

220. For example, in *Powermatic/Houdaille, Inc.*, 71 Lab. Arb. (BNA) 54 (1978) (Cocalis, Arb.), the grievant's discharge for "immoral conduct" was reduced to a suspension. *See id.* at 56. While the words "sexual harassment" do not appear in the arbitration, the conduct at issue—grievant sticking his finger through the zipper of his pants, approaching a female co-worker, and telling her what he "had for her"—would today be classified conduct creating or contributing to hostile environment sexual harassment. *See id.* at 55-56.

221. In the language area, I also drew a distinction between "garden variety" expletives and language which could possibly be considered sexual harassment under Title

cided after sexual harassment was recognized by circuit courts as a claim, but not before then. Again, the deciding factor was whether the arbitrator's treatment of the grievance would contribute to the employer's dilemma.

The resulting database contains 316 arbitrations.[222] It is important to note, however, that even with this methodology, some relevant arbitration opinions were not included.[223]

2. What the Data Revealed

Generally, almost half of all discipline issued for sexual harassment (or conduct which could constitute sexual harassment under Title VII standards) is altered by the arbitrator. Of the 316 arbitrations examined: discipline in 42 instances was completely reversed—leaving no penalty; while discipline in 110 instances was reduced—with some lesser penalty allowed. Further, some amount of back pay was awarded to the grievant in 66% of the arbitrations reversing or altering the employer's penalty.[224] While penalty modification in almost half of the arbitrations is troublesome, the positive side is that some penalty is almost always allowed.[225] Thus, arbitrators generally recognize that some discipline is appropriate when sexually harassing conduct occurs.

Like the courts considering Title VII cases,[226] however, arbitrators tend to require no particular level of discipline for any particular type of harassment.[227] Discharge was the most frequent choice of discipline for employers, consisting of approximately 71% of the arbitra-

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VII. The task of sorting language reveals, at least in part, the difficulty with harassment law. In general, I eliminated cases which involved language which is neither sexualized nor directed (that is, not stated to another person, or made about another person). For example, the term "bitch," even muttered under one's breath, but in the presence of another, and arguably about that individual, would be included, while a similar muttering of "Life's a bitch," would not be included.

222. These arbitration cases are listed in the Appendix.

223. For example, the opinion in the *Chrysler* arbitration, which overturned a discharge, and was subsequently upheld in district court, was not reported in any of the search sources. There are sure to be others similarly not reported. The search was extensive enough, however, to reach some general conclusions, and identify the general trends discussed here.

224. Back pay was awarded in 96 of 152 reversals and reductions. Further, back pay was not imputed in eight reductions because the original penalty did not disrupt pay.

225. A very slight majority (52%) of the arbitrations upheld the original penalty. When combined with the number of arbitrations in which some penalty was allowed, more than 86% of cases resulted in a penalty of some sort.

226. *See supra* notes 183-86 and accompanying text.

227. Not even uncontested, unwelcome, overt sexual touching automatically yields discharge. *See, e.g.*, Chrysler Motors Corp. v. International Union, Allied Indus. Workers, 959 F.2d 685, 687-88 (7th Cir. 1992) (holding that it is within the arbitrator's power to reinstate an employee charged with sexual assault). Indeed, not even lesser penalties were consistently upheld in instances of overt sexual touching. *See, e.g.*, General Electric Co., No. 93-09863, 1994 WL 837646, at *6-7 (Jan. 5, 1994) (Millious,

tions studied. A somewhat surprising fact, however, was that discharges were upheld (54%) to a greater degree than were lesser penalties (47%).[228]

TABLE 1: TOTAL REVIEWED ARBITRATIONS BY RESULT AND VICTIM TYPE

	Employee	Student	Customer	Public	Total
Total	259	25	29	3	316
Reversed	33	3	6	0	42
Reduced	92	11	6	1	110
Upheld	134	11	17	2	164
	(52%)	(44%)	(59%)	(67%)	(52%)

Interestingly, discipline was most likely to be upheld when a customer or member of the public was involved. Arbitrators, perhaps

TABLE 2: REVIEWED ARBITRATIONS BY PENALTY TYPE, VICTIM TYPE, AND RESULT

	Employee	Student	Client	Public	Total
Total Discharges	182	16	25	2	225
Reversed	18	2	4	0	24
Reduced	67	7	5	1	80
Upheld	97	7	16	1	121
Total Lesser Penalties	77	9	4	1	91
Reversed	15	1	2	0	18
Reduced	25	4	1	0	30
Upheld	37	4	1	1	43

more attuned to business than civil rights considerations, placed great weight on a company's need to maintain customers and a good reputation in the community at large. For example, in *South Central Bell Telephone*,[229] the arbitrator upheld the discharge of a telephone installer who had propositioned a customer, stating that he was "unwilling to . . . reinstate this man and send him into the homes of . . . subscribers."[230] More recently, in *Taylor Beverage Co.*,[231] Arbitrator Fullmer similarly refused to reinstate a discharged employee in part because the employee's harassing behavior would have serious commercial effects.[232]

Arb.) (reducing a reprimand to a warning, even though the victim testified that she felt something between her legs as the grievant passed behind her).

228. I also analyzed the data to determine how, if at all, other factors affected whether the penalty was upheld. I initially reviewed the arbitrations by type of victim, type of penalty and type of employer. These results are presented in Tables 1-3.

229. 71-1 Arb. ¶ 8297 (1971) (Ray, Arb.).

230. *Id.* at 4044.

231. 97-1 Arb. ¶ 3131 (1996) (Fullmer, Arb.).

232. *Id.* at 3727-28.

TABLE 3: REVIEWED ARBITRATIONS BY TYPE OF ENTITY AND RESULT

	Private	Public/State	Federal	Total
Total Discharges	159	64	2	225
Reversed	20	4	0	24
Reduced	49	29	2	80
Upheld	90	31	0	121
Total Lesser Penalties	27	52	12	91
Reversed	7	9	2	18
Reduced	6	22	2	30
Upheld	14	21	8	43
Total Arbitrations	186	116	14	316
All Reversed	27	13	2	42
All Reduced	55	51	4	110
All Upheld	104	52	8	164

Private sector employers also fared much better than governmental entities in having their selected discipline sustained—nearly 60% of private sector penalties were upheld, compared to 46% of public sector penalties.[233]

The role of prior discipline, the type of harassment, and the approval rate of discipline over time were also reviewed.[234] As might be expected, prior discipline played a significant role in whether the penalty assessed by the employer was upheld.[235] Prior discipline was discussed in some form in 215 cases. When there had been a prior occurrence of discipline, the discipline at issue was upheld in 62% of the cases. In contrast, when there had been no prior discipline, the discipline at issue was upheld in 38% of the cases. Despite this relatively low rate, there were twenty-five instances of upheld discharges even when the grievant had had no prior discipline.

Among those cases in which there had been prior discipline, there was very little difference based on the cause of the prior discipline. Where the grievant had been previously disciplined for sexual harassment (with or without additional unrelated discipline) the employers' choice of discipline was upheld 64% [61/96] of the time. When there was only unrelated discipline (not related to sexual harassing conduct), the approval rate—62% [16/26]—remained high. In comparison, when the grievant had no prior discipline at all, approval of the employer's discipline plummeted to 39% [33/85].

233. *See supra* Table 3.

234. Additional factors of interest were discussed too infrequently in the arbitrations to reach even tentative conclusions. These included the longevity of the grievant and his overall work, as opposed to disciplinary record, geographic location, and discrimination against the alleged harasser on other bases.

235. In 111 arbitrations, the issue of prior discipline was not discussed at all; thus, no assumptions can be made as to whether there was such discipline. For those cases, the employers' choice of discipline was upheld 49% of the time.

The type of sexual harassment also had an impact on whether the arbitrator upheld the imposed discipline. For example, 61% of all levels of discipline were sustained when the conduct involved overt sexual touching, followed very closely by 60% of discipline sustained for all physical harassment. The highest rate of upheld discipline occurred, however, when the alleged harasser engaged in some type of stalking activity—such as inappropriate following, isolating, or threatening the victim. A much lower rate of upholding penalties occurred when only verbal harassment was involved (about 50%), and even lower when non-verbal gawking, staring, or pestering occurred (45%).[236]

Lastly, I attempted to discern if there were any trends developing over time. In light of the heightened awareness of sexual harassment, some changes would be expected as arbitrators become sensitized to the issue and aware of the liability the employer faces if it fails to take action to eliminate known sexual harassment. Overall, the percentage of instances in which arbitrators upheld the employer's choice of discipline increased over time. While slightly fewer penalties were upheld in 1990 than in 1995, the percentage of penalties upheld after 1990 (55% of discharges and 48% of lesser penalties) was dramatically greater than the percentage of penalties upheld before 1990 (45% of discharges and 44% of lesser penalties).

TABLE 4: ARBITRATION RESULTS BY YEAR

	1969-79	1980-84	1985-89	1990-94	1995-98
All Penalties	11	33	59	132	81
Reversed	1	7	10	16	8
Reduced	5	10	25	38	32
Upheld	5	16	24	78	41
Discharges	11	25	39	91	58
Reversed	1	3	5	11	4
Reduced	5	10	19	27	19
Upheld	5	12	16	53	35
Lesser Penalties	0	8	19	41	23
Reversed	0	4	5	5	4
Reduced	0	0	6	11	13
Upheld	0	4	8	25	6

In addition to looking at overall trends, I attempted to cull out arbitrations where the key basis for the decision was a failure of proof due to credibility issues, since under my proposed reforms the arbitrator would retain the duty to weigh credibility and find facts.[237]

236. In the arbitrations examined, visual harassment, including gestures, always occurred along with some other type of harassment, and thus is not analyzed separately here.

237. This was done because any reform of the system would leave intact the arbitrator's duty to determine the credibility of the witnesses. Under any system, it is likely

This analysis shows only general trends, as arbitrators would frequently cite multiple reasons for their actions. In the forty-two instances where no penalty was allowed, due process considerations were cited twelve times,[238] and proof failure—including failure of the victim to testify—was cited nineteen times.[239] In fourteen instances, the arbitrator determined that the conduct at issue was not sexual harassment.[240] Lack of notice, former laxity on the part of the employer, and inconsistency in treatment were cited six times.[241] When the pen-

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that reversals, and even reductions in penalties, occur because the arbitrator disbelieves the complaining victim, or the victim fails to appear at the hearing.

238. *See* Contico Int'l, Inc., 1996 WL 865254 (July 1996) (Crider, Arb.); National Educ. Ass'n, 23 LAIS 3710 (1995) (Bloodsworth, Arb.); Delta Beverage Group, Inc., 1995 WL 707557 (June 12, 1995) (Singer, Arb.); Headquarters Space & Missile, 103 Lab. Arb. (BNA) 1198 (1995) (McCurdy, Arb.); Earle M. Jorgensen Steel & Aluminum Co., FMCS No. 93-12897, 1994 WL 854694 (Apr. 5, 1994) (Goldstein, Arb.); Pennyrile Rural Elec. Coop. Corp., FMCS No. 93-10232, 1993 WL 788392 (Aug. 24, 1993) (Wren, Arb.); City of Riviera Beach, FMCS No. 91-28226, 1992 WL 732099 (Mar. 26, 1992) (Mayer, Arb.); Stroehman Bakeries, 98 Lab. Arb. (BNA) 873 (1990) (Sands, Arb.); Heublein, Inc., 88 Lab. Arb. (BNA) 1292 (1987) (Ellmann, Arb.); DeVry Inst. of Tech., 87 Lab. Arb. (BNA) 1149 (1986) (Berman, Arb.); Kidde, Inc., 86 Lab. Arb. (BNA) 681 (1985) (Dunn, Arb.); Veterans Admin. Med. Ctr., 82 Lab. Arb. (BNA) 25 (1984) (Dallas, Arb.).

239. *See* County of Santa Clara, 106 Lab. Arb. (BNA) 1092 (1996) (Levy, Arb.); Hennessy Indus., Inc., 23 LAIS 3703 (1996) (Crane, Arb.); Metropolitan Council Transit Operators, 106 Lab. Arb. (BNA) 68 (1996) (Daly, Arb.); Benzie County Cent. Schs., 1995 WL 852208 (Jan. 16, 1995) (Borland, Arb.); City of San Antonio, 1995 WL 707528 (June 28, 1995) (Moore, Arb.); AFSME Dist. Council 81, Local 218, 1994 WL 875876 (Dec. 12, 1994) (DiLauro, Arb.); Indiana Univ., 94-2 Arb. ¶ 4543 (1994) (Heekin, Arb.); Saginaw Intermediate Bd. of Educ., 95-1 Arb. ¶ 5049 (1994) (Lipson, Arb.); Pennyrile Rural Elec. Coop. Corp., FMCS No. 93-10232, 1993 WL 788392 (Aug. 24, 1993) (Wren, Arb.); Duke Univ., 100 Lab. Arb. (BNA) 316 (1993) (Hooper, Arb.); City of Riviera Beach, FMCS No. 91-28226, 1992 WL 732099 (Mar. 26, 1992) (Mayer, Arb.); City of Pembroke Pines, 93 Lab. Arb. (BNA) 365 (1989) (Cantor, Arb.); City of Seattle, 15 LAIS 3629 (1987) (Snow, Arb.); Clover Park Sch. Dist. 89, 89 Lab. Arb. (BNA) 76 (1987) (Boedecker, Arb.); Akron Metro. Reg'l Transp. Auth., 13 LAIS 2122 (1986) (Strasshofer, Jr., Arb.); Shell Oil Co., 85-1 Arb. ¶ 8130 (1984) (Coffey, Arb.); Veterans Admin. Med. Ctr., 82 Lab. Arb. (BNA) 25 (1984) (Dallas, Arb.); Dodds Liverno Am. High Sch., 82 Lab. Arb. (BNA) 761 (1983) (Zack, Arb.); Port Huron Area Sch. Dist., 80-1 Arb. ¶ 8174 (1980) (Lipson, Arb.).

240. *See* Fleming Foods, Inc., Houston Div., FMCS No. 96-25543-8, 1997 WL 585677 (May 30, 1997) (Bankston, Arb.); National Educ. Ass'n, 23 LAIS 3710 (1995) (Bloodsworth, Arb.); Genesee County, Friend of the Court, 1994 WL 861447 (June 21, 1994) (Ellmann, Arb.); Georgia Pac. Corp., FMCS No. 92-20643, 1993 WL 788325 (Jan. 28, 1993) (Nicholas, Jr., Arb.); Bethlehem Steel Corp., 1993 WL 801302 (June 21, 1993) (Oldham, Arb.); Prudential Insurance Co. of Am., 1993 WL 801372 (Nov. 16, 1993) (Heinsz, Chairman); International Union of Operating Eng'rs, 93-2 Arb. ¶ 3440 (1992) (Fisher, Arb.); Nuclear Fuel Servs., 93 Lab. Arb. (BNA) 1204 (1989) (Clarke, Arb.); City of Seattle, 15 LAIS 3629 (1987) (Snow, Arb.); Independent Sch. Dist., No. 833, 88 Lab. Arb. (BNA) 713 (1987) (Gallagher, Arb.); Shell Oil Co., 85-1 Arb. ¶ 8130 (1984) (Coffey, Arb.); Washington Scientific Indus., 83 Lab. Arb. (BNA) 824 (1984) (Kapsch, Sr., Arb.); Louisville Gas & Elec. Co., 81 Lab. Arb. (BNA) 730 (1983) (Stonehouse, Jr., Arb.); Southern New England Tel. Co., 9 LAIS 1270 (1982).

241. *See* Delta Beverage Group, Inc., 1995 WL 707557 (June 12, 1995) (Singer, Jr., Arb.); Earle M. Jorgensen Steel & Aluminum Co., FMCS No. 93-12897, 1994 WL 854694 (Apr. 5, 1994) (Goldstein, Arb.); City of Minneapolis, 101 Lab. Arb. (BNA)

alty was reduced, due process issues—other than lack of notice, former laxity and inconsistency—were cited only eight out of 110 arbitrations.[242] Concerns that the punishment was simply too severe for the conduct was cited thirty times,[243] and the need for progressive discipline was cited twenty-four times (including eight instances where severity was also cited).[244]

1006 (1993) (Daly, Arb.); RMS Tech., 17 LAIS 3686 (1990) (Nicholas, Jr., Arb.); King Soopers, Inc., 86 Lab. Arb. (BNA) 254 (1985) (Sass, Arb.); Kentucky Textile Indus., Inc., 70-1 Arb. ¶ 8127 (1969) (Williams, Arb.).

242. *See* University of Mich., 1997 WL 753691 (Jan. 9, 1997) (House, Arb.); USAF, 107 Lab. Arb. (BNA) 1089 (1997) (Stephens, Arb.); Avis Rent a Car Shuttlers, 105 Lab. Arb. (BNA) 1057 (1995) (Wahl, Arb.); Dow Chem. Co., 95 Lab. Arb. (BNA) 510 (1990) (Sartain, Arb.); Ohiocubco, Inc., 88-2 Arb.¶ 8394 (1988) (Savage, Arb.); Santa Clara County, 88 Lab. Arb. (BNA) 1226 (1987) (Concepcion, Arb.); Weber Aircraft, Inc, 13 LAIS 3344 (1985) (Dunn, Arb.); Vons Grocery Co., 11 LAIS 1259 (1984) (Kaufman, Arb.).

243. *See* Safeway, Inc., 108 Lab. Arb. (BNA) 787 (1997) (Staudohar, Arb.); Department of Corrections, D.C., 1996 WL 658897 (May 19, 1996) (Rogers, Arb.); County of San Joaquin Sheriff's Dep't, 1995 WL 600998 (Feb. 13, 1995) (Bogue, Arb.); Avis Rent a Car Shuttlers, 105 Lab. Arb. (BNA) 1057 (1995) (Wahl, Arb.); Michigan Dep't of Transp., 104 Lab. Arb. (BNA) 1196 (1995) (Kelman, Arb.); Norfolk Naval Shipyard, 104 Lab. Arb. (BNA) 991 (1995) (Bernhardt, Arb.); City of Harper Woods, 21 LAIS 2080 (1994) (Sugerman, Arb.); United Foods & Commercial Workers Union, Local #653, 1993 WL 797829 (Apr. 9, 1993) (Berquist, Arb.); Springfield Local Sch. Dist., 93-2 Arb. ¶ 3524 (1993) (Curry, Jr., Arb.); United Tel. Co., FMCS No. 92-12531, 1992 WL 726466 (Oct. 2, 1992) (Richard, Arb.); State of Wash. Printing Dep't, 98 Lab. Arb. (BNA) 440 (1992) (Griffin, Arb.); Association of Machinists & Aerospace Workers, 1991 WL 693196 (Sept. 4, 1991) (DiLauro, Arb.); Dow Chem. Co., 95 Lab. Arb. (BNA) 510 (1990) (Sartain, Arb.); GTE Fla., Inc., 92 Lab. Arb. (BNA) 1090 (1989) (Cohen, Arb.); National Oats Co., Inc., 17 LAIS 3765 (1989) (Smith, Arb.); Stater Bros. Mkts., 16 LAIS 4238 (1989) (Wilmoth, Arb.); City of Corpus Christi, 16 LAIS 3951 (1988); Ohio Dep't of Transp., 90 Lab. Arb. (BNA) 783 (1988) (Duda, Jr., Arb.); Washoe County Sherrif's Deputies Ass'n, 88-2 Arb. ¶ 8415 (1988) (Staudohar, Arb.); Rockford Sch. Dist., 88-2 Arb. ¶ 8367 (1987) (Traynor, Arb.); County of Ramsey, 86 Lab. Arb. (BNA) 249 (1986) (Gallagher, Arb.); Mobil Oil, 14 LAIS 3707 (1986) (Ellmann, Arb.); Stearns County, Minn., 13 LAIS 2093 (1986) (ARB); Todd Shipyards Corp., 13 LAIS 3442 (1985) (Koven, Arb.); Meijer, 83 Lab. Arb. (BNA) 570 (1984) (Ellmann, Arb.); Consolidation Coal Co., 79 Lab. Arb. (BNA) 940 (1982) (Stoltenberg, Arb.); Hayes Int'l Corp., 81-2 Arb. ¶ 8603 (1981) (Carson, Arb.); Perfection Am. Co., 73 Lab. Arb. (BNA) 520 (1979) (Flannagan, Arb.); Campbell Soup Co., 78-2 Arb. ¶ 8293 (1978) (Weiss, Arb.); Powermatic/Houdaille, Inc., 71 Lab. Arb. (BNA) 54 (1978) (Cocalis, Arb.).

244. *See* Madison County (Ind.) Youth Ctr., 1997 WL 706680 (Feb. 6, 1997) (Brunner, Arb.); United Food & Commercial Workers Union, 1996 WL 578202 (Mar. 7, 1996) (Goldberg, Arb.); Department of Corrections, D.C., 1996 WL 658897 (May 19, 1996) (Rogers, Arb.); Fairfield City Sch. Dist., 107 Lab. Arb. (BNA) 669 (1996) (Duff, Arb.); Firestone Synthetic Rubber & Latex Co., 107 Lab. Arb. (BNA) 276 (1996) (Koenig, Arb.); County of Hennepin, Minn., 1995 WL 600954 (May 20, 1995) (Boganno, Arb.); Medical College of Ohio, 1995 WL 852272 (Dec. 1, 1995) (Duda, Jr., Arb.); Avis Rent a Car Shuttlers, 105 Lab. Arb. (BNA) 1057 (1995) (Wahl, Arb.); Michigan Dep't of Transp., 104 Lab. Arb. (BNA) 1196 (1995) (Kelman, Arb.); City of Troy, 1994 WL 853738 (May 13, 1994) (Daniel, Arb.); Cass County Bd. of Comm'rs, 1994 WL 854715 (May 31, 1994) (Fogelberg, Arb.); Independent Sch. Dist. 255, 21 LAIS 4012 (1994) (Daly, Arb.); Nob Hill Foods, 1993 WL 814033 (Sept. 9, 1993) (Silver, Arb.); King County Dep't of Adult Detention, 21 LAIS 2084 (1993) (McCaffree, Arb.); Flushing Community Sch., 100 Lab. Arb. (BNA) 444 (1992) (Daniel, Arb.);

3. The Arbitrators' Analysis: The Seven Just Cause Factors

While the numbers show the general trends and demonstrate in broad terms why arbitrators are not sustaining nearly half of all employer imposed penalties for sexual harassment, a closer look at their written analysis reveals that courts in sexual harassment cases and arbitrators deciding the appropriateness of discipline look at discipline from different perspectives. In the context of Title VII cases, courts do not analyze whether the level of discipline imposed by the employer *exceeded* what was needed to constitute prompt and appropriate corrective action. Rather, courts determine whether the employer has taken *sufficient* steps—including disciplining the harasser[245]—to eliminate the hostile environment. Thus, under Title VII, courts do not acknowledge the possibility of imposing too much discipline.[246] Arbitrators, on the other hand, ask whether the discipline was excessive—either under the principle of progressive discipline or under the general requirement of just cause.[247]

In determining whether to sustain a grievance, the primary function of an arbitrator is to interpret and enforce the terms of the contract,

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Ralphs Grocery Co., 100 Lab. Arb. (BNA) 63 (1992) (Kaufman, Arb.); Green Bay Packing Co., FMCS No. 90-25109, 1991 WL 716705 (June 13, 1991) (Fogelberg, Arb.); KIAM, 97 Lab. Arb. (BNA) 617 (1991) (Bard, Arb.); Dow Chem. Co., 95 Lab. Arb. (BNA) 510 (1990) (Sartain, Arb.); Honeywell, Inc., 95 Lab. Arb. (BNA) 1097 (1990) (Gallagher, Arb.); National Oats Co., Inc., 17 LAIS 3765 (1989) (Smith, Arb.); Ohio Dep't of Transp., 90 Lab. Arb. (BNA) 783 (1988) (Duda, Jr., Arb.); Washoe County Sherrif's Deputies Ass'n, 88-2 Arb. ¶ 8415 (1988) (Staudohar, Arb.); County of Ramsey, 86 Lab. Arb. (BNA) 249 (1986) (Gallagher, Arb.); Sugardale Foods, Inc., 86 Lab. Arb. (BNA) 1017 (1986) (Duda, Jr., Arb.); Greyhound Lines, Inc., 13 LAIS 3630 (1985) (Kaufman, Arb.); Hyatt Hotels Palo Alto, 85 Lab. Arb. (BNA) 11 (1985) (Oestreich, Arb.); David R. Webb Co., 84-1 Arb. ¶ 8290 (1984) (Kossoff, Arb.).

245. As previously noted, the employer's action must be "reasonably calculated to end the harassment," and the lack of discipline may lead to a finding that the action was not reasonable. *See* Intlekofer v. Turnage, 973 F.2d 773, 778 (9th Cir. 1992) (citing Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983)). In *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), for example, the employer's ultimate decision to settle the grievance and have a six-month separation and cooling-off period was deemed insufficient because there was no discipline of the harasser. *See id.* at 881-83.

246. To the contrary, where courts address the issue of discipline, they do so for the purpose of determining whether there was enough discipline. *See* Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994). In reversing a summary judgment for the defendant, the Ninth Circuit noted that the delayed discharge of the harasser was not prompt and appropriate action which would relieve the employer of liability. *See id.* at 1464. Rather, the court wondered why the employer had not fired the harasser "outright and early on." *Id.*

247. The sixth and seventh factors identified by Arbitrator Daugherty in *Enterprise Wire Co.*, 46 Lab. Arb. (BNA) 359, 362 (1966) (Daugherty, Arb.), as relevant to a determination of just cause pertain to the reasonableness of the penalty, even in the absence of a progressive discipline requirement. *See* Hyatt Hotels Palo Alto, 85 Lab. Arb. (BNA) 11 (1985) (Oestreich, Arb.) (reducing a discharge penalty to a fifteen day suspension without pay). In reducing a discharge, Arbitrator Oestreich stated that, "[o]ne of the underlying philosophies of progressive discipline is that the purpose of the disciplinary action is rehabilitation." *Id.* at 15.

not to enforce Title VII.[248] Thus, the arbitrator's duty is to look to the terms of the contract and related work rules to determine whether there has been compliance.[249] In a Title VII case, by contrast, the court's primary focus is on interpreting and enforcing that statute.

Moreover, a closer look at the seven factors identified by Arbitrator Daugherty as relevant in determining whether an employer had just cause for disciplining an employee[250] reveals that all but the second factor—was the company's rule or managerial order reasonably related to (a) the orderly, efficient and safe operation of the business and (b) the performance that the company might expect of the employee—may lead an arbitrator making a just cause determination to reach a different conclusion than a court analyzing the same facts in a Title VII case. Thus, the possibility of conflict under six of the seven factors—especially combined with Arbitrator Daugherty's admonition that the employer's failure to comply with even one factor forecloses a finding of just cause—means that at least the potential for conflicting decisions is ever present.

a. *Factor 1: Warning the Employee About the Consequences of His Actions*

The first component of just cause requires that the employee have knowledge of the rule that he is alleged to have violated and of the consequences of violating it. Although arbitrators sometimes uphold discipline for severe forms of harassment in the absence of a policy,[251]

248. In upholding an arbitrators' reinstatement of an employee dismissed for sexual harassment, the court in *Communications Workers v. Bell Atlantic-West Virginia, Inc.*, 27 F. Supp. 2d 66 (D.D.C. 1998), addressed the dilemma of apparent conflicts between Title VII and the just cause requirement of a collective bargaining agreement. Noting that the company knew of its Title VII obligations at the time the contract was negotiated, the court refused to read a more stringent requirement into the contract.

> That 1996 agreement established rights and obligations concerning the 'just cause' required to support the dismissal of a six-month employee, without any specific reference to the company's rights and obligations regarding the prevention of sexual harassment in the workplace. If the 'just cause' standard as embodied in the agreement fails to shield Bell Atlantic to its satisfaction from its future liabilities under Title VII, it is a dilemma of the company's own making.

Id. at 71.

249. Even where the arbitrator recognized the difference, it usually did not influence the decision. *See, e.g.*, Michigan Dep't of Transp., 104 Lab. Arb. (BNA) 1196, 1201 (1995) (Kelman, Arb.) (reducing a three-day suspension to a written warning in keeping with the contract's requirement for progressive discipline, despite the employer's fear that it would be sued by the victim); County of Ramsey, 86 Lab. Arb. (BNA) 249, 254 (1986) (Gallagher, Arb.) (reducing a discharge to a thirty-day suspension because penalty was too severe for the conduct and employer's fear of liability did not matter).

250. *See supra* note 206 and accompanying text.

251. In *Alaska*, 84 Lab. Arb. (BNA) 897, 900 (1985) (Krebs, Arb.), the arbitrator upheld a five-day suspension, noting that the grievant would not need a warning to know that breast grabbing could lead to discipline.

many view the lack of a policy, or the failure to define sexual harassment clearly, as not providing sufficient notice of what behavior will lead to discipline. Thus, an employer who has no sexual harassment policy, or who has failed to fully inform its employees of what the plan means, increases the likelihood that an arbitrator will reverse its disciplinary action.[252] In fact, lack of notice was a recurring reason for reversing discipline.[253]

For an employer that has no sexual harassment policy, the only hope of avoiding Title VII liability is to act quickly and forcefully upon knowledge of conduct that constitutes legal sexual harassment.[254] If the discipline exacted in such situations is light, courts are likely to view such an employer as one that does not take sexual harassment seriously but merely metes out a late "slap on the wrist" in order to avoid liability.[255] By contrast, an employer that imposes severe discipline in the absence of a sexual harassment policy cannot realistically expect to persuade an arbitrator that it has satisfied the requirement, under the first factor, that the employee know of the employer's sexual harassment policy.

Arbitrators have also found, however, that even where a policy exists, it must be sufficiently detailed to inform the employee of what conduct is improper. This is especially true where the conduct is am-

252. For example, in *Delta Beverage Group, Inc.*, 1995 WL 707557, at *15 (June 12, 1995) (Singer, Arb.), a discharge was reversed because the employer did not distribute its sexual harassment policy until after the incident upon which the discharge took place.

253. A frequent problem was that the policy was too vague, or the conduct was innocuous so as not to fit clearly within the policy. In *American Mirrex Corp.*, 1992 WL 698140 (Feb. 5, 1992) (Edgett, Arb.), the grievant's conduct of walking around with his pants noticeably below his waist was held to be sexual harassment, but his discharge was reduced because the grievant had not received a prior warning. In *KIAM*, 97 Lab. Arb. (BNA) 617, 630 (1991) (Bard, Arb.), the arbitrator similarly reduced the discharge of the grievant, because the policy was vague, and it was not clear whether the grievant was committing harassment or simply trying to date the victim. In *RMS Technologies*, 94 Lab. Arb. (BNA) 297, 300-02 (1990) (Nicholas, Arb.), the arbitrator found the policy too vague, and also raised First Amendment questions regarding the conduct (bringing in a magazine) with which grievant was charged.

254. *Compare* Davis v. Tri-State Mack Distribs., Inc., 981 F.2d 340, 343-44 (8th Cir. 1992) (finding that warning the harasser of potential future discharge was an insufficient token effort and criticizing the employer for not having a sexual harassment policy), *with* Knabe v. Boury Corp., 114 F.3d 407, 413-14 (3d Cir. 1997) (holding that a non-disciplinary conversation which warned of the further consequences of harassment was sufficient where the harassment stopped and where the company had an open door policy on sexual harassment).

255. The court in *Davis v. Tri-State Mack Distributors* noted, "Although we recognize that the 'mere existence of a grievance procedure and a policy against discrimination,' does not necessarily 'insulate [an employer] from liability[,]' if Tri-State had had an effective sexual harassment policy in place, the results of this case may have been different." 981 F.2d at 344 (citations omitted).

biguous[256] and the policy simply mirrors Title VII case language or EEOC regulations.[257] As noted in part II, courts have struggled with that language, and, aside from overtly sexual conduct or words, it can be unclear what type of conduct constitutes sexual harassment.[258]

Finally, the notice requirement includes notice of the consequences of the conduct. While this factor somewhat overlaps the requirement relating to reasonableness of penalty, in some instances discipline was modified not on the ground that the penalty was unreasonable in an objective sense, but on the basis that the grievant had insufficient notice of the consequence.[259] Moreover, even when the policy provides for the penalty, such penalty may not be assessed if the authorization is vague.[260]

256. As noted, conduct must be sufficiently severe or pervasive to rise to the level of actionable sexual harassment. Employers and employees alike may be quick to recognize severe conduct as sexual harassment. They may be less likely to recognize the potential illegal status of lesser conduct, which is also legal sexual harassment if it occurs with sufficient frequency to be considered pervasive. Notice that this type of conduct is grounds for discipline even before it rises to that level of pervasiveness. If the employee waits until the activity becomes pervasive enough to be considered legal sexual harassment, it may well find itself simultaneously liable, since that same pervasiveness may provide the victim with a basis for arguing that the conduct was public and ongoing, and thus the employer "should have known" about it and taken corrective action.

257. In *Prudential Insurance Co. of America*, 1993 WL 801372 (Nov. 16, 1993) (Heinsz, Chairman), the employer had a sexual harassment policy that parroted in large part the EEOC guidelines. The grievant received a warning letter after engaging a female co-worker in conversation that she considered sexual in nature. *See id.* at *3. In ordering a warning letter rescinded and allowing no penalty, the arbitrator noted that while the company was free to implement rules more stringent than Title VII, it had not clearly done so. *See id.* at *7. "The problem lies in its failure to put its employees, including Grievant, on sufficient notice that the kind of acts charged to Grievant is within the scope of the conduct which is not tolerated under its sexual harassment policy." *Id.* at *8; *see also KIAM*, 97 Lab. Arb. at 625-30 (reducing a discharge to a written warning because, *inter alia*, the sexual harassment policy was vague, and providing a thorough discussion on the relationship between Title VII and the arbitrator's role).

258. *Prudential Insurance*, 1993 WL 801372, at *8, is an example of just such a problem. *See also* note 87 and accompanying text (discussing the range of perspectives used to evaluate conduct in sexual harassment situations).

259. This is particularly a problem when the penalty assessed is discharge. For example, *National Oats Co., Inc.*, 90-1 Arb. ¶ 8257 (1989) (Smith, Arb.); *Vons Grocery*, 88-2 Arb. ¶ 8611 (1987) (Prihar, Arb.); *Boys Markets, Inc.*, 88 Lab. Arb. (BNA) 1304 (1987) (Wilmoth, Arb.); *Sugardale Foods, Inc.*, 86 Lab. Arb. (BNA) 1017 (1986) (Duda, Arb.); and *David R. Webb Co.*, 84-1 Arb. ¶ 8290 (1984) (Kossoff, Arb.), all involved discharges reduced to lesser penalties because the policies at issue failed to specify sexual harassment as being subject to summary discharge.

260. In *Ralphs Grocery Co.*, 100 Lab. Arb. (BNA) 63 (1992) (Kaufman, Arb.), the sexual harassment policy authorized penalties up to discharge. In reducing a discharge for explicit verbal harassment, the arbitrator noted that while the policy authorized discharge, it did not call for discharge in every instance. *See id.* at 66.

b. *Factor 2: Reasonable Business Relatedness of the Rule*

The second factor—which asks whether the company's rule is reasonably related to the efficient operation of the business—would appear not to create tension between the arbitrator's role in evaluating the reasonableness of the employer's rules and the court's role in determining whether the employer has complied with its duty to prevent and eliminate sexual harassment. Certainly, a rule designed to prevent the employer from breaking a federal law and from incurring expenses and loss due to sexual harassment[261] would seem to meet the just cause standard for business relatedness, and arbitrators generally find that anti-harassment rules are reasonable.[262] Even before sexual harassment was recognized as a separate cause of action under Title VII, arbitrators found work rules pertaining to "immoral conduct" and "abusive language" to be reasonable and upheld discipline based on violations of such rules.[263] Thus, employers had the right to regulate conduct, regardless of whether the conduct constituted sexual harassment or had other legal implications, or whether the conduct simply affected the efficient operation of the business.

Arbitrators dealing with rules violations, however, sometimes face interpretational difficulties dissimilar to judges in sexual harassment cases. In *Underwood Glass*,[264] the arbitrator noted that foul and profane language must be viewed in the totality of the circumstances. From an arbitrator's viewpoint, these circumstances include consideration of the prevailing atmosphere at the company—and, in some instances, in the industry—as a basis for finding the conduct reasonable and not subject to discipline.[265] When a judge in a sexual harassment

261. In addition to the obvious and substantial legal costs directly attributed to sexual harassment, employers suffer losses due to lost productivity and similar issues. One estimate is that sexual harassment costs for a Fortune 500 company are approximately $6.7 million annually, in the form of reduced productivity, absenteeism, employee turnover, and the use of internal complaint processes. Carrie A. Bond, Note, *Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace*, 65 Fordham L. Rev. 2489, 2499-500 (1997).

262. Employers are free to institute reasonable work rules unilaterally, so long as they are not inconsistent with law or the collective bargaining agreement. *See* Elkouri & Elkouri, *supra* note 188, at 764. Rules banning sexual harassment, or even conduct which is arguably "only" a precursor to sexual harassment, cannot be said to conflict with the law. Furthermore, collective bargaining agreements routinely contain anti-discrimination language.

263. In *Cincinnati Cleaning & Finishing Machinery Co.*, 73-2 Arb. ¶ 8397 (1973) (Chalfie, Arb.), the arbitrator upheld the discharge of a grievant who rubbed the sides and patted the buttocks of two female co-workers—whom the arbitrator referred to as "girls"—on the ground of immoral conduct.

264. 58 Lab. Arb. (BNA) 1139, 1142 (1972) (Hon, Arb.).

265. *See* Coca-Cola Bottling Co., 106 Lab. Arb. (BNA) 776 (1996) (Borland, Arb.) (taking into consideration the all-male environment in deciding to reduce a discharge); Metropolitan Transit Comm'n, 106 Lab. Arb. (BNA) 360, 364 (1996) (Imes, Arb.) (holding a supervisor's participation as sexual horseplay and a reason to reduce discharge); City of Minneapolis, 101 Lab. Arb. (BNA) 1006, 1008 (1993) (Daly, Arb.)

case looks at the totality of circumstances to assess the existence of sexual harassment, however, the fact that the employer has allowed a hostile environment, replete with jocular activities, to exist over a period of time is likely to cut against that employer.

Another example of dissimilar interpretational problems is illustrated in *Powermatic*,[266] where the contract at issue provided that immoral conduct was a dischargeable offense.[267] There, the arbitrator struggled with defining the word "immoral" and ultimately reduced a discharge after finding that the conduct at issue was improper, but not "immoral."[268] In the context of sexual harassment, however, the employer, in need of removing a harassing employee from the workplace, may not be concerned with the nuances which distinguish improper from immoral conduct. Indeed, many forms of sexual harassment might not be considered "immoral" as such.[269]

Further, there is a need to understand the double-edged nature of such discipline: under sexual harassment law, the primary purpose of discipline is not to rehabilitate the harasser, but to eliminate the hostile environment or potentially face legal liability. Further, whether the environment ceases to be hostile is viewed, at least in part, from the perspective of the victim. Thus, the selected discipline must not only prevent the conduct from recurring, but also give some level of assurance to the victim that it will not recur.[270] Arbitrators, however, do not always understand this distinction or the need to adhere to this tenet.[271] Indeed, in *County of Ramsey*,[272] the arbitrator even suggested that the employer could use the arbitrator's action—modifying the imposed discipline—as a defense in a subsequent sexual harassment case.[273] In that case, the arbitrator reduced a discharge and noted that fear of liability for sexual harassment was not a factor for his consideration in determining the appropriateness of the penalty

(noting that all employees at the 911 facility cursed to relieve stress and, thus, deciding to reverse suspension and allow no penalty).

266. 71 Lab. Arb. (BNA) 54 (1978) (Cocalis, Arb.).

267. *Id.* at 55.

268. *Id.* at 55-56. In that instance, immoral conduct was a dischargable offense under the contract, so the interpretation governed whether the discharge could stand.

269. For example, in *Ellison v. Brady*, the harassment consisted of sending "love letters," which, although the sender "could be portrayed as a modern-day Cyrano de Bergerac," were contextually frightening and threatening. 924 F.2d 872, 880 (9th Cir. 1991).

270. This is because a victim's environment can continue to be hostile, even in the absence of continued action, if the victim is unaware that the harasser is not going to act again. At least for some length of time, the atmosphere will continue to be poisoned by the fear that the abusive conduct will recur.

271. The point is that the need to reassure the victim—which should be considered in sexual harassment cases—is *not* a tenet of arbitration. Thus, the arbitrator need not consider that factor when evaluating the propriety of the discipline imposed by the employer. *See supra* note 205 and accompanying text.

272. 86 Lab. Arb. (BNA) 249 (1986) (Gallagher, Arb.).

273. *See id.* at 253-54.

because the employer could defend any subsequent action by showing that it tried to discharge the grievant but was overturned in arbitration.[274] While this may indeed protect the employer from liability, it does not consider whether removal of the harasser was necessary to actually end the hostile environment and protect future victims.

The trend in the reviewed arbitrations shows that lesser penalties were modified more frequently than discharges, and this was often because the arbitrator viewed the conduct too trivial to warrant discipline.[275] Arbitrators should recognize, however, the employers' legal need to impose discipline where conduct is ambiguous. Low levels of discipline for sporadic, ambiguous conduct may be necessary to keep the conduct from growing into harassment, either because the harasser's conduct becomes more blatant in the absence of discipline,[276] or simply because continuation of the same conduct over time becomes sufficiently pervasive to constitute harassment. Thus, in addition to recognizing the inherent reasonableness of employer rules that specifically prohibit "sexual harassment," arbitrators should assess the reasonableness of all related conduct by the employer which seeks to preclude or eliminate sexual harassment.

c. *Factor 3: The Pre-Discipline Investigation*

The third factor in determining just cause focuses on whether the employer made an effort to determine that the employee was in fact guilty of the alleged misconduct before imposing discipline. Here, an arbitrator assessing just cause and a court assessing Title VII liability look at the existence and timing of the employer's investigation from different perspectives. Indeed, the very reasons for the respective investigations are different.

Discipline imposed without a *prior* investigation of the alleged misconduct normally will not satisfy the just cause requirement and will, therefore, be reversed by the arbitrator.[277] In contrast, the employer must take prompt action reasonably calculated to end the harassment in order to avoid liability under Title VII.[278] Although to avoid Title VII liability an employer's investigation must almost always be fol-

274. *See id.* at 253.

275. *See supra* Table 2.

276. In *Medical College of Ohio*, FMCS No. 95-06172, 1995 WL 852272, at *3-4 (Dec. 1, 1995) (Duda, Arb.), the arbitrator reduced a discharge of grievant for touching the buttocks of a co-worker and simulated oral sex to a sixty-day suspension, on the grounds that the company's failure to discipline him for earlier less serious offenses may have lulled the grievant into committing this more serious offense. Prior lax enforcement is also a basis that arbitrators use to reduce or disallow penalties. *See In re* Coca-Cola Bottling Co., 106 Lab. Arb. (BNA) 776, 780 (1996) (Borland, Arb.).

277. *See* Elkouri & Elkouri, *supra* note 188, at 919; *see also* Weber Aircraft, 86-1 Arb. ¶ 8200 (1985) (Dunn, Arb.) (noting that grievant was suspended before the company obtained his version of events and that his later discharge was tainted even though he had a prior record of similar behavior).

278. *See supra* Part III.B.2.a.

lowed by the imposition of some form of discipline if the investigation shows the charges are true, there is no Title VII requirement to investigate before acting.[279] An employer who immediately discharges an alleged harasser has acted in a way which would certainly end the harassment and, thus, fulfills its Title VII obligation.[280]

The thoroughness of the investigation also impacts differently on sexual harassment liability and just cause determinations. A cursory or sloppy investigation with no discipline will likely lead to liability under Title VII.[281] Thus, it seems to follow that the employer who conducts a cursory investigation may feel some pressure to also discipline the alleged harasser. Discipline issued after a cursory or sloppy investigation, however, is not likely to be sustained by an arbitrator.[282] In contrast, where an investigation is too long, some courts may find that the employer's action was not sufficiently prompt to avoid Title VII liability.[283]

d. *Factor 4: The Fairness of the Investigation*

The fourth factor, which evaluates the fairness of the employer's investigation, again involves substantive differences between the interests of an arbitrator and the interests of a court. Just cause mandates that the investigation must be fair to the accused employee.[284] On the other hand, Title VII does not take into account the rights of the ac-

279. Title VII does not impose any substantive responsibilities on employers. Rather, it prohibits the employer from making distinctions based on certain bases, including sex. 42 U.S.C. § 2000e-2(a) (1995). Thus, it does not require an investigation.

280. While Title VII does not require that an employer discharge the harasser in order to avoid liability in every instance, *see* Waymire v. Harris County, 86 F.3d 424, 429 (5th Cir. 1996), in some instances failure to discharge does lead to liability. *See* Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463 (9th Cir. 1994). Moreover, where the mere presence of the harasser perpetuates the hostile environment, discharge may also be required. *See* Ellison v. Brady, 924 F.2d 872, 883 (9th Cir. 1991) (noting that "[t]o avoid liability under Title VII for failing to remedy a hostile environment, employers may even have to remove employees from the workplace if their mere presence would render the working environment hostile").

281. *See* Yates v. Avco Corp., 819 F.2d 630, 635 (6th Cir. 1987) (relying in part on problems in the investigation as a basis for finding the employer liable for sexual harassment).

282. *See* Firestone Rubber & Latex Co., 107 Lab. Arb. (BNA) 276, 283-84 (1996) (Koenig, Arb.) (reducing discharge to long-term suspension in part because the employer did not fairly and objectively investigate the employee accused of racial, ethnic, and sexual harassment; the employer did not consider the problems that prompted co-workers' complaints or the veracity of those complaints, nor did it seek verification from grievant that he actually committed the complained of actions); Earle M. Jorgensen Steel & Aluminum Co., FMCS No. 93-12897, 1994 WL 854694, at *13 (Apr. 5, 1994) (Goldstein, Arb.) (finding no just cause in part due to a poor investigation where the employer first made only general and discreet inquiries and later asked leading questions).

283. *See supra* Part III.B.2.a.

284. *See* Elkouri & Elkouri, *supra* note 188, at 918-19 (explaining the due process and procedural requirements for disciplinary actions taken by employers).

cused harasser. The contradiction contained in these two positions is obvious. For example, the accused has a right to know the identity of his accuser and must have a meaningful opportunity to answer the charges.[285] In contrast, sexual harassment policies frequently guarantee the confidentiality of the complainant. When the identity of the alleged victim is withheld, or even when its release is delayed, arbitrators have not hesitated to vacate the imposed discipline.[286]

Employers must also be mindful of the timing of the investigation. An employer may wish to separate the accuser and accused while the investigation is pending.[287] Moving the victim may result in Title VII claims of retaliation or otherwise result in employer liability for sexual harassment.[288] Because an investigation is normally expected to precede any disciplinary decision,[289] moving the accused prior to an investigation may prevent an employer from successfully imposing a penalty.

e. *Factor 5: Burden and Standard of Proof*

The fifth factor—which requires substantial evidence that the employee was guilty of the alleged misconduct—results in one of the most critical differences between the arbitrator's role in determining

285. For a discussion on the issue of confidentiality, see *Whitaker v. Carney*, 778 F.2d 216 (5th Cir. 1985). In response to a former city employee's mandamus action to enforce a request for access to sexual harassment complaints filed with the city against him by certain female employees, the court concluded that there was no support for the proposition that Title VII's regulations required employers to maintain a confidential grievance procedure. *See id.* at 220-21. For a discussion on the issue of a meaningful opportunity to answer charges, see *Delta Beverage Group, Inc.*, 1995 WL 707557, at *15 (June 12, 1995) (Singer, Arb.) (reversing a discharge because grievant was not interviewed before the discharge), and *Pennyrile Rural Electric Cooperative Corp.*, FMCS No. 93-10232, 1993 WL 788392, at *14 (Aug. 24, 1993) (Wren, Arb.) (reversing a discharge because employer did not conduct any investigation and took complaint at face value).

286. In some instances, the employer may receive an "off the record" complaint. *See supra* notes 173-74 and accompanying text. Although unofficial, the complaint creates actual employer knowledge. If the allegation includes harassing conduct towards others in addition to the complainant, the employer may nonetheless have to investigate, and again, may not do so confidentially, without offending the just cause requirement for a fair and impartial investigation. *See* Great Midwest Mining Corp., Int'l Bd. of Teamsters, Local 541, 82 Lab. Arb. (BNA) 52, 55 (1984) (Mikrut, Arb.).

287. *See* 3 Employment Discrimination, *supra* note 2, § 46.07[5][b], at 46-108.

288. In *Yates v. Avco Corp.*, 819 F.2d 630, 635 (6th Cir. 1987), for example, the court was concerned with the employer's having placed the victim on continuing sick leave, as opposed to administrative leave, a practice which left the victim with no record of the real reason for the leave and in fear that she was endangering her position as an employee. The need to protect the victim's employment status, even during the investigation, is consistent with the EEOC's position that an employer's corrective action is appropriate when it "fully remedie[s] the conduct without adversely affecting the terms or conditions of the charging party's employment in some manner (for example, by requiring the charging party to work . . . in a less desirable location)." EEOC Compliance Manual (CCH) § 615.4(a)(9)(iii), at 3213 (1991).

289. *See* Kidde, Inc., 86 Lab. Arb. (BNA) 681, 682 (1985) (Dunn, Arb.).

just cause and the court's role in determining whether the employer took adequate corrective action to avoid Title VII liability. In arbitration, an employer defending its disciplinary action bears the burden of persuasion on the question of whether the alleged misconduct actually occurred.[290] Moreover, disciplinary action, particularly discharge, for acts of immorality has been characterized as constituting "economic capital punishment" because of the "enormous social stigma."[291] As a result, many arbitrators have imposed an enhanced standard of proof on the employer in such cases, requiring clear and convincing evidence,[292] and sometimes even proof beyond a reasonable doubt.[293] Of the eighty reviewed arbitrations in which the standard of proof was specified, proof by a preponderance of the evidence was approved only nineteen times.[294] The most prevalent standard was clear and

290. *See* Elkouri & Elkouri, *supra* note 188, at 905. In *Indiana Michigan Power Co.*, 103 Lab. Arb. (BNA) 248 (1994) (Alexander, Arb.), the arbitrator described the employer's burden for discharging an employee as having to prove: (1) notice of the rule; (2) notice of the consequences; (3) violation of the rule; and (4) that progressive discipline is futile. *See id.* at 255.

291. *See* King Soopers, Inc., 86 Lab. Arb. (BNA) 254, 262 (1985) (Sass, Arb.). Individuals discharged for such reasons are assumed to have little chance of obtaining similar employment. Indeed, plaintiff tort theories of negligent hiring, sometimes coupled with sexual harassment cases, add credence to this assumption.

292. *See* Madison County (Ind.) Youth Ctr., 1997 WL 706680, at *7 (Feb. 6, 1997) (Brunner, Arb.); Kroger Co., FMCS No. 96-21600-8, 1997 WL 585693, at *6 (May 16, 1997) (Nicholas, Arb.); Hughes Family Mkts., Inc., 107 Lab. Arb. (BNA) 331, 333 (1996) (Prayzich, Arb.); George Koch Sons, Inc., 102 Lab. Arb. (BNA) 737, 742 (1994) (Brunner, Arb.).

293. All but one of the arbitrators using this standard were discharges of the case. In some instances the standard was used in tandem with the level of penalty. For example, an arbitrator might hold an employee to the beyond a reasonable doubt standard for discharge for sexual harassment but to the preponderance of the evidence standard for a suspension. Under this formulation, not meeting the proof standard will not necessarily result in no penalty, but most likely, a reduced penalty. Thus, in *Benzie County Central Schools*, 1995 WL 852208, at *18 (Jan. 16, 1995) (Borland, Arb.), a discharge was reduced to a long-term suspension (reinstatement with no back pay) because sexual harassment was not proven beyond a reasonable doubt. Although the grievant, a bus driver, had engaged in inappropriate behavior with a student, the student did not view the conduct as harassment. The employer thus could not prove sexual harassment beyond a reasonable doubt. *See id.* at *17.

294. *See* Birmingham-Jefferson County Transit Auth., FMCS No. 96-11046, 1996 WL 901984 (July 2, 1996) (Giblin, Arb.); City of Flint, 104 Lab. Arb. (BNA) 124 (1995) (House, Arb.); DC Pub. Schs., 105 Lab. Arb. (BNA) 1037 (1995) (Johnson, Arb.); Potlatch Corp., 104 Lab. Arb. (BNA) 691 (1995) (Moore, Arb.); USS, Div. of USX Corp., 1994 WL 853785 (Aug. 5, 1994) (Dybeck, Arb.); Independent Sch. Dist. 255, 102 Lab. Arb. (BNA) 993 (1994) (Daly, Arb.); Superior Coffee & Foods, 103 Lab. Arb. (BNA) 609 (1994) (Alleyne, Arb.); Georgia Pac. Corp., FMCS No. 92-20643, 1993 WL 788325 (Jan. 28, 1993) (Nicholas, Jr., Arb.); The Clorox Co., FMCS No. 93-15077, 1993 WL 800921 (Aug. 4, 1993) (Nicholas, Jr., Arb.); U.P.S., FMCS No. 93-04244, 1993 WL 801403 (Nov. 18, 1993) (Nicholas, Jr., Arb.); Vermont State College, 100 Lab. Arb. (BNA)1193 (1993) (McHugh, Chairman); University of Mich., 1992 WL 717113 (July 20, 1992) (House, Arb.); Dayton Newspapers, 100 Lab. Arb. (BNA) 48 (1992) (Strasshofer, Arb.); Clover Park Sch. Dist. 89, 89 Lab. Arb. (BNA) 76 (1987) (Boedecker, Arb.); Kraft, Inc., Sealtest Foods, 89 Lab. Arb. (BNA) 27 (1987) (Goldstein, Arb.); Akron Metro. Regional Transp. Auth., 13 LAIS 2122 (1986)

convincing proof used in thirty-three of the studied arbitrations,[295] with proof beyond a reasonable doubt approved in eight instances.[296] In addition, three cases stated that the evidence met both enhanced standards without specifying which standard was required.[297]

On the other hand, the victim of sexual harassment who files a Title VII suit against an employer is held only to a preponderance of the evidence standard.[298] The employer thus faces a Hobson's choice in cases where there is significant but less than compelling evidence of harassment. If the employer imposes stiff discipline, a grievance will

(Strasshofer, Jr., Arb.); Veterans Admin. Med. Ctr., 87 Lab. Arb. (BNA) 405 (1986) (Yarowsky, Arb.); Houston Lighting & Power, 80 Lab. Arb. (BNA) 941 (1983) (Bailey, Arb.); United States Army Signal, 78 Lab. Arb. (BNA) 120 (1982) (Hall, Arb.).

295. *See* Schuylkill Metals, Inc., 1997 WL 585656 (Apr. 18, 1997) (Nicholas, Jr., Arb.); The Kroger Co., FMCS No. 96-21600-8, 1997 WL 585693 (May 16, 1997) (Nicholas, Jr., Arb.); Metropolitan Council Trans. Operations, 1996 WL 881639 (Feb. 5, 1996) (Berquist, Arb.); Hoechst Celanese Corp., 97-1 Arb. ¶ 3176 (1996) (Nolan, Arb.); Veterans Admin. Med. Hosp., 95-2 Arb.¶ 5402 (1995) (Nicholas, Jr., Arb.); Vista Chem., 104 Lab. Arb. (BNA) 819 (1995) (Nicholas, Jr., Arb.); General Elec. Co., FMCS No. 93-09863, 1994 WL 837646 (Jan. 5, 1994) (Millious, Arb.); City of Troy, 1994 WL 853738 (May 13, 1994) (Daniel, Arb.); DOA, Sixth Infantry Div., 94-1 Arb.¶ 4170 (1994) (Landau, Arb.); Ecolab, Inc., 1993 WL 788049 (June 9, 1993) (Goldstein, Arb.); Nestle Beverage Co., FMCS No. 93-14178, 1993 WL 788801 (Dec. 6, 1993) (Traynor, Arb.); Vision-Ease, BMC Indus., FMCS No. 93-18058, 1993 WL 801382 (Dec. 31, 1993) (Mathews, Arb.); Chief Judge, 17th Judicial Circ., 94-1 Arb. ¶ 4126 (1993) (Nathan, Arb.); Duke Univ., 100 Lab. Arb. (BNA) 316 (1993) (Hooper, Arb.); Ferro Corp. , 93-2 Arb.¶ 3501 (1993) (Curry, Arb.); Michigan Dep't of Soc. Servs., 93-2 Arb. ¶ 3454 (1993) (Girolamo, Arb.); Quaker Oats Co., 95-1 Arb. ¶ 5038 (1993) (Berstein, Arb.); Sullivan's New Mkt., 1993 WL 797829 (1993) (Berquist, Arb.); City of Riviera Beach, FMCS No. 91-28226, 1992 WL 732099 (Mar. 26, 1992) (Mayer, Arb.); Independent Sch. Dist. No. 196, 1992 WL 724758 (Oct. 27, 1992) (Berquist, Arb.); Central Mich. Univ., 99 Lab. Arb. (BNA)134 (1992) (McDonald, Arb.); Flushing Community Sch., 100 Lab. Arb. (BNA) 444 (1992) (Daniel, Arb.); Green Bay Packing Co., FMCS No. 90-25109, 1991 WL 716705 (June 3, 1991) (Fogelberg, Arb.); Colonial Sch. Dist., 96 Lab. Arb. (BNA) 1122 (1991) (DiLauro, Arb.); Shell Pipe Line, 97 Lab. Arb. (BNA) 957 (1991) (Baroni, Arb.); Port Huron Area Sch. Dist., 80-1 Arb. ¶ 8174 (1990) (Lipson, Arb.); GTE Fla., 92 Lab. Arb. (BNA) 1090 (1989) (Cohen, Arb.); Ohio Dep't of Transp., 90 Lab. Arb. (BNA) 783 (1988) (Duda, Jr., Arb.); Sugardale Foods, Inc., 86 Lab. Arb. (BNA) 1017 (1986) (Duda, Jr., Arb.); Tampa Elec. Co., 88 Lab. Arb. (BNA) 791 (1986) (Vause, Chairman); Veterans Admin. Med. Ctr., 82 Lab. Arb. (BNA) 25 (1984) (Dallas, Arb.); Care Inns, Inc., 81 Lab. Arb. (BNA) 687 (1983) (Taylor, Arb.); University of Mo., 78 Lab. Arb. (BNA) 417 (1982) (Yarowsky, Arb.).

296. *See* Benzie County Cent. Schs., 1995 WL 852208 (Jan. 16, 1995) (Borland, Arb.); Beloit Manhatten, 1991 WL 693196 (Sept. 4, 1991) (DiLauro, Arb.); King Soopers, Inc., 86 Lab. Arb. (BNA) 254 (1985) (Sass, Arb.); Town of Winchester, 9 LAIS 2002 (1981) (Sacks, Arb.); Youngstown Hosp. Ass'n, 76-2 Arb. ¶ 8409 (1976) (Laybourne, Arb.); Cincinnati Cleaning & Finishing Machinery Co., 73-2 Arb.¶ 8397 (1973) (Chalfie, Arb.); South Cent. Bell Tel. Co., 71-1 Arb.¶ 8297 (1971) (Ray, Arb.).

297. *See* International Mill Serv., 104 Lab. Arb. (BNA) 779 (1995) (Marino, Arb.); Pennyrile Rural Elec. Coop. Corp., FMCS No. 93-10232, 1993 WL 788392 (Aug. 24, 1993) (Wren, Arb.); Defense Logistics Agency, 91 Lab. Arb. (BNA) 1391 (1989) (Duda, Jr., Arb.).

298. *See, e.g.*, McCue v. Department of Human Resources, Nos. 96-3412, 97-3004, 97-3238, 1999 WL 5064, at *4 (10th Cir. 1999) (applying a preponderance standard).

likely follow and may be sustained by the arbitrator because the employer does not have the proof to satisfy an enhanced standard of proof. If the employer chooses to impose a lesser form of discipline, or no discipline whatsoever, it may be found liable under Title VII and its lower standard of proof because it did not take appropriate action.

f. *Factor 6: Fairness and Even-Handedness of the Penalty*

The sixth factor relevant in determining just cause—the fairness and even-handedness of the discipline—has no counterpart in assessing the existence of a hostile environment or the appropriateness of the employer's response under Title VII. In determining whether the penalty is fair, the arbitrator will compare the employer's treatment of other employees who violated the rule. When the employer has previously been lax in enforcing its anti-harassment rules, the arbitrator will likely consider a harsh penalty unfair and reduce the penalty.[299] In the Title VII context, however, the employer's prior failure to enforce a sexual harassment policy will probably increase the likelihood that the court will find a hostile environment and impose liability.[300] The earlier unchecked harassment becomes part of the "totality of circumstances" that the court examines to determine whether the acts alleged by the plaintiff were part of a pattern of pervasive behavior.[301] At the same time, the existence of unchecked harassment tends to put the employer on notice that a hostile environment exists, increasing the chances that a court will impose Title VII liability—even in the absence of a formal complaint by the employee—on the grounds that the employer should have known about the harassment.[302]

In assessing the fairness of the discipline imposed on the employee, arbitrators also take into account whether the employer has complied with the principle of progressive discipline.[303] Again, this considera-

299. *See* Federal Bureau of Prisons, FMCS No. 94-20428, 1995 WL 793810, at *10-11 (Jan. 16, 1995) (Hoh, Arb.) (reducing a discharge to thirty-day suspension because the employer condoned raucous behavior for years); Earle M. Jorgensen Steel & Aluminum Co., FMCS No. 93-12897, 1994 WL 854694, at *19 (Apr. 5, 1994) (Goldstein, Arb.) (reversing a discharge because employer tolerated considerable shop talk and horseplay); City of Minneapolis, 101 Lab. Arb. (BNA) 1006, 1008-09 (1993) (Daly, Arb.) (reversing a two-day suspension because the employer was lax in enforcement). Even discharge for severe conduct can be reduced on this basis. In *King Soopers Inc.*, 101 Lab. Arb. (BNA) 107, 112-13 (1993) (Snider, Arb.), a bargaining unit employee's discharge for repeated instances of patting the buttocks of one co-worker and at least one instance of touching the breast of another co-worker was reduced to a twenty-day suspension because the company had treated management employees with similar offenses less severely.

300. *See supra* Part III.B.1.

301. *See supra* Part II.B.4.

302. *See supra* notes 175-77 and accompanying text.

303. *See, e.g.*, Fairfield City Sch. Dist., 107 Lab. Arb. (BNA) 669, 672 (1996) (Duff, Arb.) (reducing a one-day suspension to a written warning); Firestone Synthetic Rubber & Latex Co., 107 Lab. Arb. (BNA) 276, 284 (1996) (Koenig, Arb.) (reducing discharge to a long-term suspension); City of Troy, 1994 WL 853738, at *12 (May 13,

tion plays no role in the context of a Title VII suit filed by the victim of the harassment, where the court is concerned only with whether the employer took appropriate corrective steps to end the hostile environment and not with the fairness of those steps from the harasser's perspective.

g. *Factor 7: Mitigation of Penalty*

Finally, the seventh component of just cause—the relationship of the discipline to the seriousness of the employee's offense and the employee's overall employment record—also has no counterpart in a court's evaluation of a Title VII claim. In applying this seventh factor, arbitrators take into account many factors that are totally unrelated to the existence of a hostile environment. Among the considerations relevant to an arbitrator are the employee's work record[304] and length of service.[305] While these factors are not controlling, and there are certainly instances where even employees with long, unblemished work records are discharged for sexual harassment,[306] an arbitrator's consideration of factors such as these is clearly inconsistent with a court's singular focus on whether the employer has taken sufficient steps to eliminate a hostile environment.

In one instance, for example, an employer demoted a supervisor who had created a hostile environment.[307] From the standpoint of Title VII, this action was clearly appropriate, since courts more readily impose liability on employers for hostile environments created by supervisors,[308] and the possibility of vicarious liability looms whenever a supervisor is involved in harassing conduct. In contrast, when the supervisor filed a grievance, the arbitrator found that he could not be demoted because demotions are appropriate only for employees whose job performance is poor.[309]

1994) (Daniel, Arb.) (reducing 10 hours of lost holiday pay to a written reprimand because a warning was needed before a suspension); Nob Hill Foods, 1993 WL 814033, at *9 (Sept. 9, 1993) (Silver, Arb.) (reducing a discharge to a written warning). For a discussion on the principle of "progressive discipline," see *supra* note 188 and accompanying text.

304. *See, e.g.*, West Virginia Univ. Hosp., Inc., 89-2 Arb. ¶ 8435 (1988) (Duff, Arb.) (ruling that the discharge was not warranted in light of grievant's good record).

305. *See, e.g.*, Dayton Power & Light Co., 80 Lab. Arb. (BNA) 19, 21-22 (1982) (Heinsz, Arb.) (reducing a discharge for a breast pinching incident in light of long service and an unblemished record).

306. *See, e.g.*, George Koch Sons, Inc., 102 Lab. Arb. (BNA) 737, 741-43 (1994) (Brunner, Arb.) (sustaining grievant's discharge despite recognizing that the discharge was economic capital punishment and the grievant had a thirty-seven-year unblemished record).

307. City of Key West, 106 Lab. Arb. (BNA) 652 (1996) (Wolfson, Arb.).

308. This is particularly true now that the Supreme Court has established vicarious liability for sexual harassment by supervisors. *See supra* notes 126-56 and accompanying text (discussing *Faragher* and *Burlington*).

309. *See, e.g.*, City of Key West, 106 Lab. Arb. (BNA) 652, 654 (1996) (Wolfson, Arb.) (noting that demotions must be based on performance, not misconduct). Simi-

In sum, it is clear that arbitrators applying the seven factor test of *Enterprise Wheel* must frequently address different issues than either an employer or a court analyzing a claim of sexual harassment. While not the sole explanation for reductions and reversals of employer imposed penalties for sexual harassment, the seven factors clearly contribute to the disparities.

D. *Appeals to the Courts*

An employer can attempt to reinstate disciplinary action taken against a sexual harasser that has been reversed or reduced by an arbitrator's decision by appeal. The right of reverse is limited, with one narrow exception that courts shall not enforce arbitration awards that are contrary to public policy.[310] Nevertheless, the possibility of judicial review of arbitral decisions does not alleviate the conflicts outlined above that arise between arbitrators assessing just cause and courts evaluating Title VII claims. In fact, employers that have appealed to the courts to reverse an arbitration decision obtained mixed results, largely because of the limited role courts play in reviewing arbitral decisions,[311] and the disagreement among the courts regarding the scope of the public policy exception.[312] In addition, the varying degrees which courts deem the prevention and elimination of sexual

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lar results have occurred when the employer tried to place an employee on probation for harassment. *See* Brevard County Police Benevolent Ass'n, Inc., FMCS No. 95-02404, 1995 WL 791624, at *5 (May 8, 1995) (Wolfson, Arb.).

310. *See* W.R. Grace & Co. v. Local 759, Int'l Union of the United Rubber Workers, 461 U.S. 757 (1983). The public policy at issue "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interest.'" *Id.* at 766 (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)). Therefore, arbitral decisions in contravention of some broad notion of the general public interest will not be disturbed. Moreover, in determining whether the public policy exception applies, the court may not second-guess the arbitrator's fact-finding and must refrain from drawing factual inferences not made by the arbitrator.

311. Court reviews reflect a "preference for arbitration" and "a desire to promote the benefits of labor arbitration." Exxon Shipping Co. v. Exxon Seamen's Union, 993 F.2d 357, 360 (3d Cir. 1993). Thus, the arbitrator's decision must be enforced if it was based on an arguable interpretation or application of the collective bargaining agreement, and may be vacated only if it lacks any support in the record. The Supreme Court has stated, "[a]s long as the arbitrator's award 'draws its essence from the collective bargaining agreement,'" a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987) (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

312. *See* Stephen Buehrer, *A Clash of the Titans: Judical Deference to Arbitration and the Public Policy Exception in the Context of Sexual Harassment*, 6 Am. U. J. Gender & L. 265, 287-89 (1998) (contrasting the restrictive and expansive interpretations of the public policy exception that have developed after the Supreme Court's decision in *United Paperworks*, 484 U.S. at 29).

harassment as established public policy further restrict the effectiveness of judicial review.[313]

Only four circuit courts have considered the propriety of an arbitration decision ordering reinstatement of an employee who had been discharged by the employer for sexual harassment;[314] two of the courts upheld the arbitration decision, and the other two vacated it.[315] One of the two courts that upheld the arbitrator's order to reinstate noted that there is a "well recognized" public policy against sexual harassment.[316] Further, the facts presented in those cases leave no doubt that the employees' conduct was harassing.[317] Nevertheless, the courts upheld the arbitrators' decision to reinstate the employees because the courts refused to second guess the arbitrators' decisions, which in both cases was premised on the fact that it was the employee's first offense and progressive discipline mandated a suspension rather than a discharge.[318] As seen in the preceding part, even when the existence of harassment is established, there simply is no "well-established" or "dominant" rule pertaining to *what* corrective action or discipline an employer must take to meet its legal obligation to take "appropriate" corrective action.[319] Indeed, the courts' approval of a wide range of discipline demonstrates that there is no

313. *See* Jeffrey Sarles, *The Case of the Missing Woman: Sexual Harassment and Judicial Review of Arbitration Awards*, 17 Harv. Women's L.J. 17, 17-18 (1994) (arguing that national labor public policy includes the prohibition of workplace sexual harassment and suggesting the means by which courts could ensure the recognition of this policy by arbitrators); Chris Baker, Comment, *Sexual Harassment v. Labor Arbitration: Does Reinstating Sexual Harassers Violate Public Policy?*, 61 U. Cin. L. Rev. 1361, 1370-74 (1993) (reviewing laws and legal precedents that establish a "well defined and dominant" public policy against sexual harassment).

314. There were no private sector cases relating to arbitrators' reducing penalties for sexual harassment other than discharge. One federal sector case, *King v. Frazier*, 77 F.3d 1361, 1362 (Fed. Cir. 1996), related to an arbitrator's reversal of a sixty-day suspension. Its holding, however, turned on an application of 5 U.S.C. § 7513(a), the standard for discipline in the federal service. *Id.* at 1363. Thus, the case is not applicable to the principles discussed here.

315. *Compare* Chrysler Motors Corp. v. International Union, Allied Indus. Workers, 959 F.2d 685 (7th Cir. 1992) (upholding the arbitrator's decision), *and* Communication Workers v. Southeastern Elec. Coop., 882 F.2d 467 (10th Cir. 1989) (same), *with* Stroehmann Bakeries, Inc. v. Local 776, International Bd. of Teamsters, 969 F.2d 1436 (3d Cir. 1992) (vacating the arbitrator's decision), *and* Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840 (2d Cir. 1990) (same).

316. *Chrysler Motors*, 959 F.2d at 687.

317. For example, in *Chrysler Motors*, the harasser grabbed a co-worker's breasts and announced "Yup, they're real." 959 F.2d at 686 n.1. In *Communication Workers*, the employee sexually assaulted a customer in her house. *See* 882 F.2d at 468. This might not be so in other cases: for example, where the conduct at issue is less egregious, or where the employee's conduct might be found to constitute harassment in one circuit, under a reasonable woman standard, but not by another circuit using a reasonable person standard.

318. *See Chrysler Motors*, 959 F.2d at 688-89; *Communication Workers*, 882 F.2d at 468.

319. *See supra* Part III.B.2.b.

dominant rule, and the courts have specifically held that discharge is not required.[320]

Undoubtedly, the discipline should reflect the severity of the harassment, and inappropriate employer action is therefore easy to define at the extremes: it would certainly be insufficient as a matter of law to issue only an oral admonishment to an employee who sexually assaulted a co-worker, or even to issue a written admonishment for touching a co-worker in a sexual manner. It does not follow, however, that a discharge—as opposed to a substantial suspension, a demotion, or a permanent separation—is required, or is even the "dominant" policy. The preference for a discharge in such circumstances may well be a logical assessment of "supposed public interests,"[321] but this does not meet the standard for applying the public policy exception because the imposition of any particular discipline is not mandated by law. Thus, when an arbitrator interprets a contract—which likely allows for progressive discipline—and reduces a penalty from a discharge to a long suspension, the reduction does not offend any dominant rule of law.

The courts which have overturned the arbitrator's award do not stand in direct contradiction to that point. For example, in *Stroehmann Bakeries, Inc. v. Local 776 International Brotherhood of Teamsters*,[322] the critical point for the court was that the reinstatement occurred without consideration of whether the harassment actually took place—the arbitrator reinstated the alleged harasser because of an insufficient investigation.[323] Only *Newsday, Inc. v. Long Island Typographical Union, No. 915*[324] and its progeny[325] are directly at odds. In *Newsday*, the arbitrator reinstated the alleged sexual harasser on the grounds that progressive discipline had not been applied.[326] The

320. *See* Terex Corp. v. International Union, U.A.W., No. CIV.A.2:97CV243-D-B., 1998 WL 433948, at *7-9 (N.D. Miss. June 17, 1998) (upholding an arbitrator's reduction of a discharge penalty and noting that there is no Title VII requirement for discharge).

321. W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers, 461 U.S. 757, 766 (1983) (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)).

322. 969 F.2d 1436 (3d Cir. 1992).

323. *See id.* at 1438. A similar result was reached by a district court considering the propriety of the arbitrator's award vacating a discharge on procedural grounds. *See* United Transp. Union v. Burlington N. R.R., 864 F. Supp. 138, 142 (D. Or. 1994) (vacating awards which reinstated an alleged sexual harasser because it violated public policy).

324. 915 F.2d 840 (2d Cir. 1990).

325. *See, e.g.*, Consolidated Edison v. Utility Workers' Union, No. 95 CIV. 1672 JGK., 1996 WL 374143, at *5 (S.D.N.Y. July 3, 1996) (vacating an arbitrator's award which reinstated an employee who was discharged for sexually harassing coworkers); *United Transp.*, 864 F. Supp. at 142 (finding that a referee's award required review because it reinstated an employee who was discharged for sexual harassment "contrary to well-defined and explicit public policy").

326. 915 F.2d at 843.

grievant had previously been disciplined for sexually harassing conduct by being charged with "disorderly conduct."[327] When investigation of the second charged incident revealed other unreported sexually harassing conduct, the employer discharged the grievant.[328] The arbitrator found specifically that the employer had not followed progressive discipline, noting that "if Waters had been disciplined after either of the two previously-unreported incidents, then discharge might have been appropriate following the 1988 incident."[329] The court, however, upheld the lower court's decision to vacate the arbitrator's award.[330] It found that in light of Waters's prior notice and warning and the employer's duty to maintain an environment free of sexual harassment, the arbitrator's reinstatement award was contrary to public policy.[331] Thus, while there is no answer to whether a certain level of discipline must be imposed by law, it appears that employers may find support in the case law for discharging a sexual harasser if the harasser has been disciplined earlier for sexual harassment.[332]

V. THE WAY OUT: BRIGHT LINE RULES, A TABLE OF PENALTIES, AND TOTAL RESPONSIBILITY

The problems facing the employer, the accused, and the victim are caused by two overriding factors: the ambiguous nature of the Title VII standards defining sexual harassment; and the conflict between, on the one hand, judicial proceedings designed to determine employer liability for sexual harassment and, on the other, arbitration proceedings designed to evaluate the appropriateness of disciplinary sanctions. With the ever increasing cost—direct and indirect—of sexual harassment, employers need to find a quick and efficient way to deal

327. In fact, the grievant, Waters, had originally been discharged by Newsday for the first incident, but Newsday voluntarily reinstated him, converting the discharge to a suspension. *See id.* at 842. Waters grieved the suspension, but this was upheld and Waters was specifically warned about sexual harassment. *See id.*

328. *See id.*

329. *Id.* at 843.

330. *See id.* at 845.

331. *See id.*

332. Similar results were reached in two recent unreported cases. In *Consolidated Edison v. Utility Workers' Union*, No. 95 CIV. 1672 JGK., 1996 WL 374143, at *5 (S.D.N.Y. July 3, 1996), the court, following *Newsday*, overturned an arbitrator's reinstatement of a second offender. The court specifically noted that, "[t]his is not to say that an arbitration award of reinstatement after a discharge for sexual misconduct must always be vacated as contrary to public policy," and it continued by noting that discharge might not be appropriate in the absence of an earlier discipline. *Id.* at *4. It obviously would also not be appropriate to vacate an award of reinstatement because of failure of proof or similar concerns. *See* Terex Corp. v. International U.A.W., No. CIV.A. 2:97CV243-D-B., 1998 WL 433948, at *9 (N.D. Miss. June 17, 1998) (upholding arbitrator's decision to reinstate the grievant upon concluding that the complained of conduct did not constitute sexual harassment). Of course, the arbitrator's failure to see certain conduct as sexual harassment is tied to the difficultly of recognizing sexual harassment. *See supra* Part II.

with harassment when they become aware of it. Yet, this is not occurring because alleged harassers are challenging—through the arbitration process—their employers with moderate success.

An employee's right to challenge discipline is important and should not be altered lightly.[333] Further, the significant success rate of challenges indicates that perhaps employers are in some instances acting in a manner which infringes on the rights of the accused.[334]

As was demonstrated in part II, what constitutes sexual harassment varies widely, and similar conduct may or may not be considered sexual harassment by different courts. In general, the courts have applied a "totality of the circumstances" approach to determine, on a case-by-case basis, what constitutes sexual harassment.[335] In the almost twenty years since sexual harassment has been recognized, this totality of the circumstances test has led to inconsistent results. This ambiguous, backward-looking approach causes a plethora of problems: it cannot fully insulate an employer from liability for sexual harassment because the employer may not recognize the conduct as harassment; it allows alleged harassers engaging in less blatant conduct to claim lack of notice as a defense against discipline;[336] and, perhaps most importantly, it makes it difficult for victims to determine whether the conduct they are being subjected to is prohibited by company policy.[337]

In light of *Burlington* and *Faragher*, employers must institute harassment policies in order to avail themselves of the affirmative de-

333. Employees have been successful in having their penalties for sexual harassment modified or overturned at rates comparable to other types of misconduct. *See generally* Elkouri & Elkouri, *supra* note 188, at 945-68 (reporting statistics). In fact, it appears that the employer's choice of discipline for sexual harassment is being upheld at a higher rate than other types of discipline, except those associated with dishonesty. Nonetheless, since failure to respond "appropriately" where allegations of sexual harassment are involved could lead to employer liability, there is a Hobsons' nature to the choice employers face here when compared to other disciplinary situations.

334. *See supra* Table 1 (showing that only 51% of arbitrations upheld the penalty assessed by the employer).

335. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (stating that all the circumstances surrounding the conduct must be considered to determine whether it constituted sexual harassment).

336. Lack of notice as to what constitutes the charged misconduct is a factor arbitrators consider when determining whether to mitigate discipline. *See supra* Part IV.C.3.a.

337. The lack of a specific definition of harassment is difficult for victims in the sense that many of them, particularly those working in a male-dominated setting, may well "go along to get along." If they believe that the offensive conduct is part of the culture of the workplace, they may be less likely to complain because they want to fit in. A policy that states that "harassment" based on all the circumstances is prohibited does not help the victim because she is not likely to know what this means. Indeed, the courts cannot even agree on what it means. *See supra* Part II. Thus, absent overtly sexual behavior, the victim is likely to, and indeed must, tolerate the behavior, at least initially, because she is unlikely to know at the outset whether it will continue until it reaches the level of pervasiveness needed to constitute actionable harassment. Clear indications of specifically what is prohibited will help alleviate this problem for all involved.

fense made available by these decisions. I recommend that these policies specify particular acts as employee misconduct, regardless of whether they would be sufficient to sustain a harassment suit under a Title VII standard. The policy should also contain a catch-all provision in the form of a totality of the circumstances test in order to enable the employer to impose discipline for conduct that is likely to be deemed sexual harassment under Title VII standards, but which is not specifically included in the rules and table of penalties.

The underlying policy should be clear and detailed—simply prohibiting "sexual harassment" is insufficient due to the wide variation in the meaning of that term—and it should contain a table of penalties specifying the consequences of engaging in harassing conduct. While courts may be bound by the "totality of the circumstances" test in determining whether harassment violative of Title VII has occurred, employers can and should enact rules of conduct that go beyond legally actionable sexual harassment. As a number of courts have noted, the purpose of Title VII is not to change the nature of the workplace, but only to eliminate sexual harassment that rises to a certain intolerable level.[338] Employers devising a harassment policy are not bound by the more limited goals of Title VII, but can take additional steps to ensure that all of their employees are able to work in an environment free from sexual degradation and insult.

A harassment policy along these lines is not without precedent, for companies currently have and enforce work rules and rules of conduct that cover a wide variety of employee behavior. For example, many companies authorize immediate discharge for striking a supervisor.[339] An employer could similarly authorize immediate discharge for specific types of harassing conduct. Further, employers should negotiate to have penalties imposed under this "table of penalties" reviewable only for arbitrariness and discrimination.

Moreover, some types of conduct should be grounds for summary dismissal[340] and should be uniformly recognized as such. Outside of the area of sexual harassment, grounds for summary dismissal have existed for years.[341] As noted, conduct such as striking a supervisor,

338. "[E]mployers are not under a legal duty enforceable by suits under Title VII to purify the language of the workplace." Carr v. Allison Gas Turbine Div., General Motors Corp., 32 F.3d 1007, 1010 (7th Cir. 1994); *see also* Rabidue v. Osceola Refining Co., 805 F.2d 611, 620-21 (6th Cir. 1986) (noting that Title VII was not meant to change the rough language, sexual jokes, and conversations that abound in certain work environments).

339. *See supra* note 212 and accompanying text.

340. By "summary dismissal" I mean dismissal without progressive discipline. Obviously, summary dismissals must meet "industrial due process" standards.

341. One arbitrator explained:

> Offenses are of two general classes: (1) those extremely serious offenses such as stealing, striking a foreman, persistent refusal to obey a legitimate order, etc., which usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline; (2) those less serious in-

theft of company property, use of illegal drugs on company property, and bringing a firearm onto company property are all recognized grounds for summary dismissal.

Similarly, sexual touching of a co-worker, defined as touching the breast, buttocks, crotch or genitals, or causing another to purposefully contact the harasser's body in such a fashion,[342] should become grounds for summary dismissal, regardless of intent or effect.[343] It should be beyond argument that this type of action is unacceptable and dischargable—regardless of whether a court determining the existence of sexual harassment would conclude that an occasional slap on the buttocks is acceptable.[344] At the other end of the spectrum, angry words between former paramours should ordinarily be subject to mediation—not discipline—in the early stages.[345]

> fractions of plant rules or of proper conduct such as tardiness, absence without permission, careless workmanship, insolence, etc., which call not for discharge for the first offense (and usually not even for the second or third offense) but for some milder penalty aimed at correction.

Huntington Chair Corp., 24 Lab. Arb. (BNA) 490, 491 (1955) (McCoy, Arb.).

342. This would occur, for example, if the harasser forced the victim to touch her or his breasts, genitals, buttocks, or crotch, as opposed to the harasser touching the victims body on those areas.

343. In *Oncale v. Sundowner Offshore Services, Inc.*, however, the Supreme Court made clear that all such touching would not be considered sexual harassment and distinguished non-harassing touching, such as a football coach slapping the buttocks of his players, from a boss patting the buttocks of his secretary. 118 S. Ct. 998, 1003 (1998). Of course, these are extreme examples that are easy to discern. As I noted earlier, there will always be a few easy calls. Distinguishing the lanes of the superhighway in between, however, is not easy.

344. The scenario derives from *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210 (7th Cir. 1986), and is more representative of the dilemma employers face trying to determine what conduct would subject them to liability than the two examples cited by the Supreme Court in *Oncale*. *See Oncale*, 118 S. Ct. at 1002-03.

345. While the table of penalties should generally be enforced in any case of unwelcome conduct, a difficult situation exists where the conduct involves co-workers who were previously involved in a dating relationship. While unrequited physical or emotional attraction may indeed be the basis of a sexual harassment action when the victim never encouraged the alleged harasser—as indeed it was in *Ellison*—the same situation does not exist, at least initially, when the harasser's behavior was not only accepted in the past, but was also desired and encouraged. The employer should not automatically bear the burden of liability when such a relationship sours. Unless the alleged misconduct involved violent physical touching, the first step should be mediation or counseling, which would ensure that the complainant's position has been made clear to the harasser without unduly jeopardizing his work record based on either a mistake or personal animosity. In *Intlekofer v. Turnage*, 973 F.2d 773, 780 (9th Cir. 1992), the court found that the Veteran's Administration had not taken sufficient action to end harassment of the plaintiff by her former boyfriend because it never moved beyond informal counseling and attempts to separate them. In his dissent, Judge Wiggins observed:

> I do not, of course, maintain that sexual harassment can never occur after a failed relationship between employees. Rather, I believe that the relationship is a factor to be considered both in determining if there was in fact sexual harassment and in determining what should properly be done by an employer to remedy the situation.

The actual gradations between those two points may vary from employer to employer depending on the structure of their progressive discipline system: what type of action fits into which tier of the system would obviously depend on the total number of tiers in the system.[346] Having a standardized system also means that various types of harassment would be generally categorized according to their severity and would provide harassers and their victims with clear notice of the consequences for each type of action.[347]

The following sample table of penalties is comprised of five levels. While a company could and should adapt the intermediate levels to conform with their overall disciplinary system, I submit that conduct in category I should always, under all systems, be a basis for summary discharge. In *Campbell Soup Co.*,[348] the arbitrator reduced the penalty from discharge to a one-year suspension for a harasser who lifted the complainant off the ground, rubbed his body against her and refused to release her. The arbitrator's rationale was that since the harasser had not committed the ultimate offense—rape—he should not be subjected to the ultimate punishment—discharge.[349] Fifteen years later, a man boldly grabs his female co-worker's breasts, and still is not subjected to the ultimate punishment.[350] I say this should never happen again.

A. *Sample Table of Penalties:*

CATEGORY I (summary discharge):

- Sexual touching: touching of the breast, crotch, upper thigh, genitals, or buttocks of victim or causing victim to touch harasser in similar fashion.

Id. at 785. Discipline for more serious conduct would be determined on the basis of the more serious conduct. Also, directed words in the absence of a former paramour situation would not lead to mediation. Former paramours, in my view, require special treatment because the employee engaging in a consensual on-the-job relationship has, in effect, introduced into the workplace an otherwise private matter.

346. For example, in *General Electric Co.*, FMCS No. 93-09863, 1994 WL 837646 (Jan. 5, 1994) (Millious, Arb.), the arbitrator reduced the penalty in part because under the particular system at issue, only two reprimands during an employee's entire tenure resulted in instant discharge. Classification under such a system, therefore, may result in only more serious conduct being used as the basis for a reprimand. The point, however, is that all parties know in advance precisely what penalties will be administered for particular conduct.

347. In some instances the victim will not feel her complaint has been acted on because she is unaware of the consequences the harasser suffers. For example, if a harasser receives a written reprimand, the victim, because of privacy requirements, would not be notified of the action. However, if such terms are published and known to be enforced whenever an allegation is sustained, the victim would enjoy a certain amount of confidence concerning what has happened to the harasser—which would instill confidence that the harassment will not recur—the key to eliminating the victim's perception of hostility.

348. 78-2 Arb. ¶ 8293 (1978) (Weiss, Arb.).

349. *See id.* at 4406-07.

350. *See supra* note 11 and accompanying text.

- Restraining or blocking/isolating: serves as an aggravating factor with other types of conduct, and will elevate it to a Category I penalty.
- Stalking: actions such as, persistently following, calling, or presenting gifts, combined with stated threats to the victim or himself.
- Repeat of Category II conduct.

CATEGORY II (long-term suspension (30-60 days) and permanent transfer; demotion of supervisors):
- Quasi-sexual touching: touching the neck, shoulders, knees, legs in a lingering or massaging fashion.
- Directed, sexually explicit language in the context of propositions, requests for sexual favors, or epithets.
- Pre-stalking: actions such as, persistent following, calling, or presenting gifts without stated threats, but which is contextually threatening (showing up at residence, parking lots, or obtaining unlisted phone numbers).

CATEGORY III (short-term suspension (1-29 days)):
- Display of sexually explicit photos or posters (depicting genitalia of either sex, full breasts of females).
- Directed sexual gestures.

CATEGORY IV (written warning):
- Undirected sexual gestures.
- Undirected sexual expletives.
- Undirected sexually explicit language.
- Demeaning statements regarding particular body parts.
- Directed sexual language in the context of expletives.
- Display of sexually provocative photos or posters (depicting scantily clad individuals of either sex).

CATEGORY V (oral counseling):
- Repeated requests for dates.
- Compliments referencing particular body parts.
- Directed and demeaning gender-based language, such as, girl, darling, honey, sweetie.

CATEGORY VI (mediation):
- Former paramour actions involving Category III violations or less.

Such a system has obvious advantages over the typical system which defines all harassment and provides for penalties from admonishment to discharge for the first offense.[351] The table of penalties, however, does not work in the abstract. A detailed policy with the following features should be adopted. The central feature of this policy is the concept of total responsibility. All supervisors are given the responsi-

351. *See, e.g.*, USAF, 107 Lab. Arb. (BNA) 1089, 1090 (1997) (Stephens, Arb.) (stating the agency's position to substitute a more appropriate discipline for a grievant who had been found guilty of five separate offenses).

bility to accept complaints of sexual harassment and to pass them on to appropriate personnel for investigation. A harassed employee should not have to figure out to whom she must complain, and she should be able to complain to any supervisor with whom she feels comfortable.

In return for this rigorous policy, victims, under the concept of total responsibility, must report all instances of conduct covered by the policy that they consider unwelcome. If the victim is assured that the complaint will be taken seriously and knows what the consequences of the complaint will be, she must be willing to assume her responsibility and complain. The idea of victim responsibility has been endorsed by the Supreme Court in its creation of affirmative defenses in *Faragher* and *Burlington* that will prevent employers from being held vicariously liable for otherwise unknown harassment committed by its supervisors, where the employer can prove, among other things, that the victim unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer. In explaining how an employer might meet this burden, the Court explained:

> [W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.[352]

Thus, a victim who fails to complain will normally lose her claim. Although this standard applies to harassment by supervisors, victims of harassment by anyone should ordinarily be expected to alert the employer to the problem, especially if the employer has consistently taken an aggressive stand in eliminating sexual harassment.

A requirement of victim responsibility will also result in increased fairness for the accused, who will have an early opportunity to stop the conduct, especially innocuous conduct, while the table of penalties informs the employees clearly of the consequences of certain actions.

B. *Policy Basics*

1. Complaints should be investigated by a central person/office with special training.

Ensures that the person making determinations about whether the conduct constitutes sexual harassment is knowledgeable.

2. All supervisors with knowledge of an allegedly harassing situation, whether through a complaint or otherwise, have a duty to notify the designated central person, or be subject to disciplinary action for failure to notify.

352. Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2270 (1998).

This resolves the problem of the putative victim complaining to the "wrong" person.

3. All known and potentially harassing situations must be investigated.

A judgment on the merits of the complaint cannot be made until after an investigation; thus, no complaint can be dismissed as trivial or welcome prior to an investigation. This also means, however, that employee requests that no action be taken cannot be honored because the employer has a duty to act promptly when it receives knowledge.

4. Investigations must normally commence within two business days, with permissible variations depending on factors such as the severity of the alleged harassment (same day for touching, up to five days for language only).

Ensures prompt investigations and prevents victim from believing no response is being taken, since investigations are not always visible.

5. The complainant and the accused must be separated during the investigation. This may be accomplished by moving one of them, or by placing one of them on administrative leave, with pay. This is a temporary measure and should not serve as the basis for either a retaliation charge by the complainant or a grievance by the accused.

Serves to immediately stop the harassment. By separating the accused and the accuser, it is less likely that such a move will be considered as an indication of either a "hardening" of a position against the accused or as retaliation against the victim.

6. The investigation is to be completed in a specified number of days. If the charge is substantiated, disciplinary action is imposed in accordance with the table of penalties.

Ensures timely completion of the investigation and consistent discipline.

7. In the event that a hearing follows imposition of discipline, the standard of proof should be a preponderance of the evidence, consistent with the victim's burden against the employee in sexual harassment cases.

Eliminates problem of differing standards faced by employers.

CONCLUSION

Certainly, the proposed system will not eliminate all of the problems associated with the labyrinth that the employer must maneuver when attempting to comply with the conflicting Title VII and labor principles of eliminating hostile environment sexual harassment and complying with just cause and progressive discipline mandates. It cannot and will not eliminate all employee challenges to discipline for sexual harassment, nor should it eliminate the employee's right to

make such challenges. In many instances, sexual harassment will continue to occur without witnesses, and arbitrators will continue to be neutral fact-finders in those instances.

This system, however, should eliminate the proof problems associated with the many ambiguities in sexual harassment law, as well as solve many of the problems associated with establishing just cause, such as providing clear notice, consistent enforcement, and consistent levels of penalties.

APPENDIX OF ARBITRATIONS

I. EMPLOYER-IMPOSED PENALTIES REDUCED IN ARBITRATION

Arbitration	Cite	Employer Penalty	Final Penalty
Underwood Glass	58 Lab. Arb. (BNA) 1139 (1972)	discharge	reinstate-no back pay
Campbell Soup Co.	78-2 Arb. ¶ 8293 (1978)	discharge	suspend-1 year
Powermatic/Houdaille, Inc.	71 Lab. Arb. (BNA) 54 (1978)	discharge	reinstate-no back pay
Kroger Co.	72 Lab. Arb. (BNA) 540 (1979)	discharge	reinstate-no back pay
Perfection Am. Co.	73 Lab. Arb. (BNA) 520 (1979)	discharge	reinstate-no back pay
New York Air Brake Co.	74 Lab. Arb. (BNA) 875 (1980)	discharge	suspend-3 months
Winchester, Town of	9 LAIS 2002 (1981)	discharge	suspend-1.5 months
Hayes Int'l Corp.	81-2 Arb. ¶ 8603 (1981)	discharge	suspend-30 days
Consolidated Coal Co.	79 Lab. Arb. (BNA) 940 (1982)	discharge	suspend-60 days
Dayton Power & Light	80 Lab. Arb. (BNA) 19 (1982)	discharge	suspend-7 months & last chance letter
Houston Lighting & Power	80 Lab. Arb. (BNA) 941 (1983)	discharge	reinstate-no back pay
DOD Dependent Schs.	82 Lab. Arb. (BNA) 761 (1983)	discharge	suspend-1 month
David R. Webb Co.	84-1 Arb. ¶ 8290 (1984)	discharge	reinstate-no back pay
Vons Grocery Co.	11 LAIS 1259 (1984)	discharge	reinstate-no back pay
Meijer	83 Lab. Arb. (BNA) 570 (1984)	discharge	suspend-no back pay
Hyatt Hotels Palo Alto	85 Lab. Arb. (BNA) 11 (1985)	discharge	suspend-15 days
Weber Aircraft, Inc.	13 LAIS 3344 (1985)	discharge	reinstate-no back pay
Greyhound Lines, Inc.	13 LAIS 3630 (1985)	discharge	reinstate-no back pay
Stearns County	13 LAIS 2093 (1986)	discharge	suspend-unknown duration
Ramsey, County of	86 Lab. Arb. (BNA) 249 (1986)	discharge	suspend-30 days
Sugardale Foods, Inc.	86 Lab. Arb. (BNA) 1017 (1986)	discharge	reinstate-no back pay
Minnesota Dep't of Revenue	86-2 Arb. ¶ 8591 (1986)	discharge	reinstate-no back pay
Mobil Oil	14 LAIS 3707 (1986)	discharge	suspend-1 week
Boys Mkt.	88 Lab. Arb. (BNA) 1304 (1987)	discharge	reinstate-no back pay
Ramsey County	89 Lab. Arb. (BNA) 10 (1987)	discharge	suspend-30 days

Arbitration	Cite	Employer Penalty	Final Penalty
Vons Grocery Co.	88-2 Arb. ¶ 8611 (1987)	discharge	reinstate-no back pay
New Hope, City of	89 Lab. Arb. (BNA) 427 (1987)	discharge	reinstate-no back pay
Howmet Aluminum Corp.	15 LAIS 3363 (1987)	discharge	reinstate-no back pay
Rockford Sch. Dist.	88-2 Arb. ¶ 8367 (1987)	discharge	suspend-6 months
Pan Am Support Servs.	89-1 Arb. ¶ 8306 (1988)	discharge	reinstate-no back pay
West Virginia Univ. Hosp.	16 LAIS 4245 (1988)	discharge	reinstate-no back pay
Stater Bros. Mkts.	16 LAIS 4238 (1989)	discharge	reinstate-no back pay
GTE Fla., Inc.	92 Lab. Arb. (BNA) 1090 (1989)	discharge	reinstate-no back pay
National Oats Co.	17 LAIS 3765 (1989)	discharge	suspend-6 weeks
Port Huron Area Schs.	80-1 Arb. ¶ 8174 (1990)	discharge	suspend-1 week
Pacific Union Club	94 Lab. Arb. (BNA) 1217 (1990)	discharge	suspend-2 weeks
Dow Chem.	95 Lab. Arb. (BNA) 510 (1990)	discharge	reinstate-with back pay
Honeywell, Inc.	95 Lab. Arb. (BNA) 1097 (1990)	discharge	reinstate-no back pay
MacKay Envelope Corp.	92-1 Arb. ¶ 8040 (1991)	discharge	reinstate-no back pay
Green Bay Packing Co.	1991 WL 716705 (1991)	discharge	suspend-6 months
Beloit Manhatten	1991 WL 693196 (1991)	discharge	reinstate-no back pay
KIAM	97 Lab. Arb. (BNA) 617 (1991)	discharge	warning -written
American Mirrex Corp.	19 LAIS 3984 (1992)	discharge	suspend-3 weeks
Mackay Envelope Corp.	98 Lab. Arb. (BNA) 863 (1992)	discharge	reinstate-no back pay
State of Wash. Printing Dep't	98 Lab. Arb. (BNA) 440 (1992)	discharge	demoted
Cass County	20 LAIS 3247 (1992)	discharge	suspend-10 days
United Tel.	1992 WL 726466 (1992)	discharge	suspend-30 days
Ralphs Grocery	100 Lab. Arb. (BNA) 63 (1992)	discharge	reinstate-no back pay
Flushing Community Sch.	100 Lab. Arb. (BNA) 444 (1992)	discharge	reinstate-no back pay
Duke Univ.	100 Lab. Arb. (BNA) 316 (1993)	discharge	reinstate-no back pay
Springfield Local Sch. Dist.	93-2 Arb. ¶ 3524 (1993)	discharge	reprimand

Arbitration	Cite	Employer Penalty	Final Penalty
King Soopers, Inc.	101 Lab. Arb. (BNA) 107 (1993)	discharge	suspend-20 days
Sullivan's New Mkt.	1993 WL 797829 (1993)	discharge	reinstate-no back pay
Nob Hill Foods	1993 WL 814033 (1993)	discharge	warning-written
King County Dep't of Adult Detention	21 LAIS 2084 (1993)	discharge	reinstate-no back pay
Nestle Beverage Co.	1993 WL 788801 (1993)	discharge	suspend-4 weeks
Kelly Springfield Tire Co.	94-2 Arb. ¶ 4338 (1994)	discharge	reinstate-no back pay
Indiana Univ.	94-2 Arb. ¶ 4543 (1994)	discharge	reinstate-no back pay
Cass County	1994 WL 854715 (1994)	discharge	suspend-4 months
Independent Sch. Dist. 255	102 Lab. Arb. (BNA) 993 (1994)	discharge	last chance letter
New York Dep't of Corrections	21 LAIS 2096 (1994)	discharge	suspend-90 days
Benzie County Schs.	1995 WL 852208 (1995)	discharge	reinstate-no back pay
Federal Bureau of Prisons	1995 WL 793810 (1995)	discharge	suspend-30 days
Associated Wholesale Groceries	1995 WL 869841 (1995)	discharge	reinstate-no back pay
D.C. Public Schs.	105 Lab. Arb. (BNA) 1037 (1995)	discharge	suspend-1 day
Medical College of Ohio	1995 WL 852272 (1995)	discharge	suspend-60 days
Hennessy Indus.	23 LAIS 3703 (1996)	discharge	warning
Coca-Cola Bottling, N. Ohio	106 Lab. Arb. (BNA) 776 (1996)	discharge	reinstate-no back pay
Metropolitan Council Transit	1996 WL 881639 (1996)	discharge	suspend-5 months
Metropolitan Transit Comm'n	106 Lab. Arb. (BNA) 360 (1996)	discharge	reinstate-no back pay
Safeway, Inc.	1996 WL 578202 (1996)	discharge	suspend-10 days
American Crystal Sugar Co.	1996 WL 807568 (1996)	discharge	suspend-90 days
Firestone Synthetic Rubber	107 Lab. Arb. (BNA) 276 (1996)	discharge	reinstate-no back pay
Penn Hill Sch. Dist.	107 Lab. Arb. (BNA) 566 (1996)	discharge	suspend-4 months
Nebraska Dep't of Corrections	107 Lab. Arb. (BNA) 910 (1996)	discharge	suspend-6 months
Berrien Springs Pub. Schs.	24 LAIS 3883 (1997)	discharge	reinstate-no back pay

Arbitration	Cite	Employer Penalty	Final Penalty
University of Mich.	1997 WL 753691 (1997)	discharge	reinstate-no back pay
Madison County (Ind.) Youth Ctr.	1997 WL 706680 (1997)	discharge	reinstate-no back pay
Safeway, Inc.	108 Lab. Arb. (BNA) 787 (1997)	discharge	reinstate-no back pay
Minnesota Dep't of Corrections	1997 WL 706666 (1997)	discharge	reinstate-no back pay
Maine, State of	20 LAIS 3372 (1992)	demotion	suspend-3 days
Harper Woods, City of	21 LAIS 2080 (1994)	demotion	suspend-30 days
Austin, City of	1994 WL 854713 (1994)	demotion	suspend-30 days
San Joaquin Sheriff's Dep't	1995 WL 600998 (1995)	demotion	reinstate-no back pay
Key West, City of	106 Lab. Arb. (BNA) 652 (1996)	demotion	suspend-30 days
Titusville, City of	1995 WL 791624 (1995)	probation	suspend-4 weeks
Summit City Bd. Mental Health	100 Lab. Arb. (BNA) 4 (1992)	reassign	reassignment
General Elec. Co.	1994 WL 837646 (1994)	reprimand	warning
Todd Shipyards Corp.	13 LAIS 3442 (1985)	suspend-3 days	suspend-1 day
Santa Clara County	88 Lab. Arb. (BNA) 1226 (1987)	suspend-5 days	warning-written
Corpus Christi, City of	16 LAIS 3951 (1988)	suspend unknown duration	warning-written
Ohio Dep't of Transp.	90 Lab. Arb. (BNA) 783 (1988)	suspend-30 days	suspend-5 days
Washoe, County of	88-2 Arb. ¶ 8415 (1988)	suspend-1 day	reprimand
San Diego Police Dep't	1991 WL 701926 (1991)	suspend-80 hours	suspend-40 hours
Niagara Frontier Transit	93-1 Arb. ¶ 3004 (1992)	suspend-3 days	warning-written
St. Paul, City of	100 Lab. Arb. (BNA) 105 (1992)	suspend-5 days	suspend-2 days
Troy, City of	1994 WL 853738 (1994)	suspend-10 hours	reprimand-written
Christina Sch. Dist.	1994 WL 875876 (1994)	suspend-3 days & training	transfer-60 days
Hennepin, County of	1995 WL 600954 (1995)	suspend-4 days	suspend-1 day
Norfolk Naval Shipyard	104 Lab. Arb. (BNA) 991 (1995)	suspend-1 day	reprimand
Michigan Dep't of Transp.	104 Lab. Arb. (BNA) 1196 (1995)	suspend-3 days	reprimand

Arbitration	Cite	Employer Penalty	Final Penalty
American Mail-Well Envelope	105 Lab. Arb. (BNA) 1209 (1995)	suspend-3 days	warning-verbal
Metropolitan Council Transit	106 Lab. Arb. (BNA) 68 (1996)	suspend-30 days	suspend-15 days
D.C. Dep't of Corrections	1996 WL 658897 (1996)	suspend-15 days	reprimand-written
Fairfield City Sch. Dist.	107 Lab. Arb. (BNA) 669 (1996)	suspend-1 day	warning-written
Houston, City of	107 Lab. Arb. (BNA) 1070 (1996)	suspend-10 days	suspend-4 days
USAF	107 Lab. Arb. (BNA) 1089 (1997)	suspend-3 days	admonishment-oral
Avis Rent a Car Shuttlers	105 Lab. Arb. (BNA) 1057 (1995)	suspend-30 days, demotion	demotion-limited
Cub Foods (Ohiocubco)	88-2 Arb. ¶ 8394 (1988)	suspend-30 days, transfer	counseling & transfer
Madison Metro. Sch. Dist.	17 LAIS 4122 (1990)	threat	specific directive

II. EMPLOYER-IMPOSED PENALTIES REVERSED IN ARBITRATION

Kentucky Textile Indus., Inc.	70-1 Arb. ¶ 8127 (1969)	discharge	none
Godchaux-Henderson Sugar Co.	75 Lab. Arb. (BNA) 377 (1980)	discharge	none
Southern New England Tel. Co.	9 LAIS 1270 (1982)	discharge	none
Washington Scientific Indus.	83 Lab. Arb. (BNA) 824 (1984)	discharge	none
Kidde, Inc.	86 Lab. Arb. (BNA) 681 (1985)	discharge	none
Akron Metro. Transit Auth.	13 LAIS 2122 (1986)	discharge	none
DeVry Inst. of Tech.	87 Lab. Arb. (BNA) 1149 (1986)	discharge	none
Hublein, Inc.	88 Lab. Arb. (BNA) 1292 (1987)	discharge	none
Clover Park Sch. Dist. 89	89 Lab. Arb. (BNA) 76 (1987)	discharge	none
RMS Techs.	94 LAIS 297 (1990)	discharge	none
Stroehman Bakeries	98 Lab. Arb. (BNA) 873 (1990)	discharge	none
Georgia Pac.	1993 WL 788325 (1993)	discharge	none
Carleton College	93-1 Arb. ¶ 3104 (1993)	discharge	none
King Soopers, Inc.	100 Lab. Arb. (BNA) 900 (1993)	discharge	none
Michigan Dep't of Soc. Svcs.	93-2 Arb. ¶ 3454 (1993)	discharge	none

Arbitration	Cite	Employer Penalty	Final Penalty
Bethlehem Steel Corp.	1993 WL 801302 (1993)	discharge	none
Pennyrile Rural Elec. Coop. Corp.	1993 WL 788392 (1993)	discharge	none
Vision-Ease, BMC Indus.	1993 WL 801382 (1993)	discharge	none
Earle M. Jorgensen	1994 WL 854694 (1994)	discharge	none
Saginaw Intermediate Bd. of Educ.	95-1 Arb. ¶ 5049 (1994)	discharge	none
Delta Beverage Group, Inc.	1995 WL 707557 (1995)	discharge	none
Contico Inter'l, Inc.	1996 WL 865254 (1996)	discharge	none
Schuylkill Metals, Inc.	1997 WL 585656 (1997)	discharge	none
Fleming Foods, Inc.	1997 WL 585677 (1997)	discharge	none
Pembroke Pines, City of	93 Lab. Arb. (BNA) 365 (1989)	reprimand	none
Naperville, City of	93-2 Arb. ¶ 3440 (1992)	reprimand	none
Headquarters Space & Missile	103 Lab. Arb. (BNA) 1198 (1995)	reprimand	reconsideration
National Educ. Ass'n	23 LAIS 3710 (1995)	reprimand	none
U.S. Customs Serv.	82-1 Arb. ¶ 8073 (1981)	suspend-3 days	none
Louisville Gas & Elec.	81 Lab. Arb. (BNA) 730 (1983)	suspend-7 hours	none
VA Med. Ctr.	82 Lab. Arb. (BNA) 25 (1984)	suspend-14 days	none
Shell Chem. Div.	85-1 Arb. ¶ 8130 (1984)	suspend-10 days	none
King Soopers, Inc.	86 Lab. Arb. (BNA) 254 (1985)	suspend-2 weeks	none
Independent Sch. Dist. # 833	88 Lab. Arb. (BNA) 713 (1987)	suspend-5 days	none
Seattle, City of	15 LAIS 3629 (1987)	suspend	none
Nuclear Fuel Servs.	93 Lab. Arb. (BNA) 1204 (1989)	suspend-5 days	none
City of Riviera Beach	1992 WL 732099 (1992)	suspend-5 days	none
Minneapolis, City of	101 Lab. Arb. (BNA) 1006 (1993)	suspend-2 days	none
Genesee County	1994 WL 861447 (1994)	suspend-3 days	none
San Antonio, City of	1995 WL 707528 (1995)	suspend-3 days	none

Arbitration	Cite	Employer Penalty	Final Penalty
Santa Clara County	106 Lab. Arb. (BNA) 1092 (1996)	suspend-30 days	none
Prudential Ins. Co.	1993 WL 801372 (1993)	warning	none

III. EMPLOYER IMPOSED PENALTIES UPHELD IN ARBITRATION

Cincinnati Cleaning & Finishing Machinery Co.	73-2 Arb. ¶ 8397 (1973)	discharge	same
CPC Int'l	62 Lab. Arb. (BNA) 1272 (1974)	discharge	same
Youngstown Hosp. Ass'n	76-2 Arb. ¶ 8409 (1976)	discharge	same
Champion Papers	80-1 Arb. ¶ 8198 (1979)	discharge	same
St. Regis Paper	74 Lab. Arb. (BNA) 1281 (1980)	discharge	same
Southern Bell	75 Lab. Arb. (BNA) 409 (1980)	discharge	same
Kaiser Aluminum & Chem.	81-1 Arb. ¶ 8123 (1981)	discharge	same
Pima Community College	76 Lab. Arb. (BNA) 1133 (1981)	discharge	same
University of Mo.	78 Lab. Arb. (BNA) 417 (1982)	discharge	same
Anacona Copper Co.	78 Lab. Arb. (BNA) 690 (1982)	discharge	same
Borg-Warner Corp.	78 Lab. Arb. (BNA) 985 (1982)	discharge	same
Care Inns, Inc.	81 Lab. Arb. (BNA) 687 (1983)	discharge	same
Norwalk, Bd. of Ed.	11 LAIS 2176 (1984)	discharge	same
Zia Co.	82 Lab. Arb. (BNA) 640 (1984)	discharge	same
United Elec. Supply Co.	82 Lab. Arb. (BNA) 921 (1984)	discharge	same
Nabisco Foods Co.	82 Lab. Arb. (BNA) 1186 (1984)	discharge	same
New Indus. Techniques, Inc.	84 Lab. Arb. (BNA) 915 (1985)	discharge	same
Vernitron Piezoelectric	84 Lab. Arb. (BNA) 1315 (1985)	discharge	same
Rockwell Int'l Corp.	85 Lab. Arb. (BNA) 246 (1985)	discharge	same
Porter Equipment	86 Lab. Arb. (BNA) 1253 (1986)	discharge	same
Stockham Valves & Fittings	13 LAIS 1141 (1986)	discharge	same

Arbitration	Cite	Employer Penalty	Final Penalty
Hobart Corp.	88 Lab. Arb. (BNA) 512 (1986)	discharge	same
Schlage Lock Co.	88 Lab. Arb. (BNA) 75 (1986)	discharge	same
Tampa Elec. Co.	88 Lab. Arb. (BNA) 791 (1986)	discharge	same
Ohio Dep't of Rehab. & Cor.	88 Lab. Arb. (BNA) 1019 (1987)	discharge	same
Martin Marietta Energy Sys.	14 LAIS 1097 (1987)	discharge	same
IBP, Inc.	89 Lab. Arb. (BNA) 41 (1987)	discharge	same
Cuyahoga County Hosp.	15 LAIS 3392 (1987)	discharge	same
Pittsburgh Press Club	89 Lab. Arb. (BNA) 826 (1987)	discharge	same
Harsco Corp., Can-Tex Indus.	90 Lab. Arb. (BNA) 1230 (1988)	discharge	same
Hannaford Bros. Co.	93 Lab. Arb. (BNA) 721 (1989)	discharge	same
McDonnell Douglas Corp.	94 Lab. Arb. (BNA) 585 (1989)	discharge	same
Cub Foods, Inc.	95 Lab. Arb. (BNA) 771 (1990)	discharge	same
Ohio Power Co.	92-1 Arb. ¶ 8073 (1991)	discharge	same
Cub Foods, Inc.	1991 WL 702015 (1991)	discharge	same
Michigan Consol. Gas	92-2 Arb. ¶ 8328 (1991)	discharge	same
Houston Metro. Transit	92-1 Arb. ¶ 8041 (1991)	discharge	same
Steuben Rural Elec. Corp.	98 Lab. Arb. (BNA) 337 (1991)	discharge	same
Interstate Brands	1991 WL 693105 (1991)	discharge	same
Shell Pipe Line	97 Lab. Arb. (BNA) 957 (1991)	discharge	same
Northern States Power Co.	1991 WL 701859 (1991)	discharge	same
King Soopers, Inc.	1992 WL 732275 (1992)	discharge	same
Central Mich. Univ.	99 Lab. Arb. (BNA) 134 (1992)	discharge	same
Saginaw Valley State Univ.	19 LAIS 2073 (1992)	discharge	same
Musicland Group	1992 WL 715549 (1992)	discharge	same

Arbitration	Cite	Employer Penalty	Final Penalty
University of Mich.	1991 WL 717113 (1992)	discharge	same
Owens-Brockway Plastics	93-1 Arb. ¶ 3032 (1992)	discharge	same
Stop & Shop, Inc.	1991 WL 715558 (1992)	discharge	same
Fry's Food of Az.	99 Lab. Arb. (BNA) 1161 (1992)	discharge	same
Plain Dealer Publ'g Co.	99 Lab. Arb. (BNA) 969 (1992)	discharge	same
DFT Lighting, Inc.	93-1 Arb. ¶ 3185 (1992)	discharge	same
Northeast Ohio Reg'l Sewer	1993 WL 800854 (1993)	discharge	same
Bradlees, Inc.	1993 WL 788577 (1993)	discharge	same
Quaker Oats Co.	95-1 Arb. ¶ 5038 (1993)	discharge	same
Ferro Corp.	93-2 Arb. ¶ 3501 (1993)	discharge	same
Container Corp. of Am.	100 Lab. Arb. (BNA) 568 (1993)	discharge	same
Lord Aerospace Prods.	1993 WL 800902 (1993)	discharge	same
Independent Sch. Dist. # 14	1993 WL 801318 (1993)	discharge	same
Stop & Shop, Inc.	1993 WL 788624 (1993)	discharge	same
Ecolab, Inc.	1993 WL 788049 (1993)	discharge	same
Chief Judge, 17th Judicial Circ.	94-1 Arb. ¶ 4126 (1993)	discharge	same
Michigan Dep't of Natural Res.	1993 WL 765309 (1993)	discharge	same
Clorox Co.	1993 WL 800921 (1993)	discharge	same
Orville Redenbacher Popcorn	94-1 Arb. ¶ 4149 (1993)	discharge	same
Burlington N. R.R.	1993 WL 801369 (1993)	discharge	same
Boeing Commercial Airplane	21 LAIS 3453 (1993)	discharge	same
Dominick's Finer Foods	101 Lab. Arb. (BNA) 982 (1993)	discharge	same
Eureka Co.	103 Lab. Arb. (BNA) 1151 (1993)	discharge	same
UPS	1993 WL 801403 (1993)	discharge	same

Arbitration	Cite	Employer Penalty	Final Penalty
Lohr Distributing Co.	101 Lab. Arb. (BNA) 1217 (1993)	discharge	same
International Paper Co.	101 Lab. Arb. (BNA) 1106 (1993)	discharge	same
Grant County Public Utility	21 LAIS 3819 (1994)	discharge	same
American Protective Servs. Inc.	102 Lab. Arb. (BNA) 161 (1994)	discharge	same
Environmental Protection	94-2 Arb. ¶ 4322 (1994)	discharge	same
Chicago Transit Auth.	94-1 Arb. ¶ 42245 (1994)	discharge	same
George Koch Sons	102 Lab. Arb. (BNA) 737 (1994)	discharge	same
Rockford Bd. of Educ.	1994 WL 901832 (1994)	discharge	same
Seattle Sch. Dist.	1994 WL 851212 (1994)	discharge	same
Indiana Mich. Power Co.	103 Lab. Arb. (BNA) 248 (1994)	discharge	same
Franklin County Children Servs.	1994 WL 853736 (1994)	discharge	same
Superior Coffee & Foods	103 Lab. Arb. (BNA) 609 (1994)	discharge	same
USS, Divion of USX	1994 WL 853785 (1994)	discharge	same
Minnesota Dep't of Transp.	1994 WL 854703 (1994)	discharge	same
Beloit Corp.	22 LAIS 1076 (1994)	discharge	same
Modernfold, Inc.	1994 WL 899036 (1994)	discharge	same
Morton Salt	95-1 Arb. ¶ 5096 (1994)	discharge	same
National Beef Packing Co.	103 Lab. Arb. (BNA) 1004 (1995)	discharge	same
Flint, City of	104 Lab. Arb. (BNA) 124 (1995)	discharge	same
Hopkinton Sch. Dist.	22 LAIS 3763 (1995)	discharge	same
Las Vegas, City of	1995 WL 710722 (1995)	discharge	same
Loral Vought Sys.	1995 WL 791639 (1995)	discharge	same
Armstong World, Beaver Falls	1995 WL 862046 (1995)	discharge	same
UPS	104 Lab. Arb. (BNA) 417 (1995)	discharge	same
Detroit Bd. of Educ.	1995 WL 831532 (1995)	discharge	same

Arbitration	Cite	Employer Penalty	Final Penalty
Abtco Inc.	104 Lab. Arb. (BNA) 551 (1995)	discharge	same
Potlatch Corp.	104 Lab. Arb. (BNA) 691 (1995)	discharge	same
International Mill Serv.	104 Lab. Arb. (BNA) 779 (1995)	discharge	same
Vista Chem.	104 Lab. Arb. (BNA) 819 (1995)	discharge	same
MKM Machine Tool Co.	1995 WL 793799 (1995)	discharge	same
Stark County Sheriff	105 Lab. Arb. (BNA) 304 (1995)	discharge	same
Safeway, Inc.	105 Lab. Arb. (BNA) 718 (1995)	discharge	same
Erie, City of	23 LAIS 3738 (1996)	discharge	same
International Extrusion	106 Lab. Arb. (BNA) 371 (1996)	discharge	same
Fort Wayne, City of	106 Lab. Arb. (BNA) 242 (1996)	discharge	same
Hughes Family Mkt.	1996 WL 658901 (1996)	discharge	same
AMG Indus.	106 Lab. Arb. (BNA) 322 (1996)	discharge	same
Simkims Indus.	106 Lab. Arb. (BNA) 551 (1996)	discharge	same
Taylor Beverage Co.	97-1 Arb. ¶ 3131 (1996)	discharge	same
Women & Infants Hosp.	23 LAIS 1054 (1996)	discharge	same
Fruehauf Corp.	1996 WL 875973 (1996)	discharge	same
Birmingham-Jefferson Transit	1996 WL 901984 (1996)	discharge	same
Las Vegas, City of	1996 WL 929948 (1996)	discharge	same
Hoechst Celanese Corp.	97-1 Arb. ¶ 3176 (1996)	discharge	same
Las Vegas, City of	107 Lab. Arb. (BNA) 654 (1996)	discharge	same
Hughes Family Mkt.	107 Lab. Arb. (BNA) 331 (1996)	discharge	same
Ohio Turnpike	1996 WL 865292 (1996)	discharge	same
Golden States Foods	97-2 Arb. ¶ 3238 (1997)	discharge	same
Kroger Co.	1997 WL 585693 (1997)	discharge	same
Washoe County Sch. Dist.	24 LAIS 2030 (1997)	discharge	same

Arbitration	Cite	Employer Penalty	Final Penalty
Fort Worth, City of	108 Lab. Arb. (BNA) 924 (1997)	discharge	same
Pepsi Cola	108 Lab. Arb. (BNA) 993 (1997)	discharge	same
Scott Paper	1991 WL 693104 (1991)	demotion	same
Renton Sch. Dist.	102 Lab. Arb. (BNA) 854 (1994)	demotion	partial
New York Dep't of Youth	23 LAIS 2007 (1995)	fine, reprimand	same
Snhomish Sch. Dist. # 201	1991 WL 693084 (1991)	reprimand	same
Vermont State College	100 Lab. Arb. (BNA) 1193 (1993)	reprimand	same
Iowa Dep't of Transp.	94-2 Arb. ¶ 4442 (1993)	reprimand	same
Hutchinson-Willmar Reg'l Tech.	1994 WL 854718 (1994)	reprimand	same
San Jose Unified Sch. Dist.	1995 WL 736748 (1995)	reprimand	same
Monsanto Chem. Intermediates	75 Lab. Arb. (BNA) 592 (1980)	suspend-30 days	same
United States Army Signal	78 Lab. Arb. (BNA) 120 (1982)	suspend-5 days	same
Social Sec. Admin.	81 Lab. Arb. (BNA) 459 (1983)	suspend-2 days	same
Redstone Arsenal	84-2 Arb. ¶ 8422 (1984)	suspend-3 days	same
Alaska, State of	84 Lab. Arb. (BNA) 897 (1985)	suspend-5 days	same
Fairmont General Hosp.	12 LAIS 1208 (1985)	suspend-unknown duration	same
Island Creek Coal	87 Lab. Arb. (BNA) 844 (1986)	suspend-5 days	same
VA Med. Ctr.	87 Lab. Arb. (BNA) 405 (1986)	suspend-20 days	same
Kraft Inc., Sealtest Foods	89 Lab. Arb. (BNA) 27 (1987)	suspend-3 days	same
Ohio Dep't of Rehabilitation	90 Lab. Arb. (BNA) 478 (1987)	suspend-5 days	same
Michigan State Univ.	15 LAIS 4330 (1988)	suspend-unknown duration	same
Defense Logistics Agency	91 Lab. Arb. (BNA) 1391 (1989)	suspend-10 days	same
Michigan Dep't of Corrections	94 Lab. Arb. (BNA) 253 (1990)	suspend-5 days	same
DHS, State of Minn.	1991 WL 702009 (1991)	suspend-3 days	same

Arbitration	Cite	Employer Penalty	Final Penalty
Hertz Corp.	1992 WL 738567 (1992)	suspend-5 days	same
Harve, City of	100 Lab. Arb. (BNA) 866 (1992)	suspend-3 days	same
Dayton Newspapers	100 Lab. Arb. (BNA) 48 (1992)	suspend-3 weeks	same
Independent Sch. Dist. # 196	1992 WL 724758 (1992)	suspend-3 days	same
Memphis Light & Gas	100 Lab. Arb. (BNA) 291 (1993)	suspend-indefinite	same
Norwich, City of	101 Lab. Arb. (BNA) 6 (1993)	suspend-10 days	same
Santa Catalina Island Co.	1993 WL 787981 (1993)	suspend-4 months	same
Fruehauf Trailer Corp.	93-2 Arb. ¶ 3584 (1993)	suspend-5 days	same
Phoenix, City of	102 Lab. Arb. (BNA) 879 (1994)	suspend-4 days	same
DOA, Sixth Infantry Div.	94-1 Arb. ¶ 4170 (1994)	suspend-3 days	same
Minn. Dep't of Human Servs.	1994 WL 861388 (1994)	suspend-3 days	same
Santa Cruz Transit Dist.	103 Lab. Arb. (BNA) 167 (1994)	suspend-10 days	same
Ray-o-Vac	1994 WL 901835 (1994)	suspend-5 days	same
VA Med. Hosp.	95-2 Arb. ¶ 5402 (1995)	suspend-14 days	same
D.C. Dep't of Corrections	1995 WL 852250 (1995)	suspend-30 days	same
General Mills	97-2 Arb. ¶ 3206 (1997)	suspend-3 days	same-partial back pay
Colonial Sch. Dist.	96 Lab. Arb. (BNA) 1122 (1991)	suspend-3 days, transfer	same
American Bldg. Maintenance	1997 WL 349472 (1997)	transfer	same
Philip Morris	94 Lab. Arb. (BNA) 8226 (1990)	warning	same